Supreme Court, U.S.
FILED
FEB 5 1990
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No. 89-5691

In The

Supreme Court of the United States

October Term, 1989

FRASIEL L. HUGHEY

Petitioner,

vs.

UNITED STATES

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED
SEPTEMBER 25, 1989
CERTIORARI GRANTED JANUARY 8, 1990

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FRASIEL L. HUGHEY V. UNITED STATES
NO. 89-5691

Relevant Docket Entries

09/17/86	41	Filed superseding indictment.
10/22/86	44	Filed plea agreement.
10/27/86		Re-arraignment held. Defendant enters plea of guilty (Count SS4).
12/09/86	45	Motion filed (MOT#16) (Defenant's objections to proposed order for restitution and motion for oral argument on the propriety of a restitution order).
	46	Filed memorandum in support of motion (MOT#16) (Defendant's objections to proposed order for restitution and motion for oral argument on the propriety of a restitution order).
12/22/86	47	Filed answer to motion (MOT#16) (Defendant's objections to proposed order for restitution).
01/15/87	48	Filed reply to answer to motion (MOT#16) (Defendant's objections to proposed order of restitution).
04/01/87	49	- Government's supplemental response to defendant's objections to proposed restitution order.
	50	- Defendant's reply to government's supplemental response to defendant's objections to proposed restitution order.

04/02/87		Sentencing of defendant (Count SS4) (EIGHT (8) YEARS pursuant to Title 18, United States Code, Section 4205(a)).
		Dismissed on government's motion (Counts 1-2,S1-S5,SS1-SS3,SS5-SS6).
		Motion mooted (MOT#16) (Defendant's objections to proposed order for restitution and motion for oral argument on the propriety of a restitution order).
04/06/87	51	Issued Judgment and commitment to U.S. Marshal (Count SS4).
07/31/87	54	Motion to reduce sentence filed (MOT#17) (Count SS4).
	55	Filed memorandum in support of motion to reduce sentence (MOT#17).
08/06/87	56	Filed answer to motion to reduce sentence (MOT#17).
10/07/87		Motion to reduce sentence denied (MOT#17).
	57	Order filed (ORDER that the defendant's motion to reduce sentence and to correct an illegal sentence be; and it hereby is, DENIED).
10/19/87	58	Filed notice of appeal (Count SS4) (APPL#1) (of the order denying motion to reduce sentence and to correct illegal sentence entered on October 7, 1987).

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

UNITED STATES OF AMERICA,	) CRIMINAL NO.) SA-86-CR-162
Plaintiff,	) *SECOND*
V.	) *SUPERSEDING*
FRASIEL L. HUGHEY,	) *INDICTMENT*
Defendant.	) [Vio: 18 U.S.C.) § 1709: Theft of Mail) By Postal Employee;) 18 U.S.C. § 1029(a)(2):) Credit Card Fraud]) (Filed Sept. 17, 1986)

THE GRAND JURY CHARGES:

COUNT ONE
[18 U.S.C. § 1709]

On or about October 31, 1985, in the Western District of Texas, Defendant,

FRASIEL L. HUGHEY,

being an employee of the United States Postal Service, did embezzle a letter which had been entrusted to him, and which had come into his possession intended to be conveyed by mail, the said letter being addressed to James R. Windom, 16903 Nicole, Houston, Texas, in violation of Title 18, United States Code, Section 1709.

COUNT TWO
[18 U.S.C. § 1029(a)(2)]

That between on or about December 27, 1985 and on or about January 6, 1986, in the Western District of Texas, and elsewhere, Defendant,

FRASIEL L. HUGHEY,

did knowingly and with intent to defraud use an unauthorized access device, to-wit: Mastercard Credit Card Number 5417-1160-0052-6095, issued to James R. Windom, 16903 Nicole, Houston, Texas, and by such conduct did obtain things of value aggregating more than $1,000, such offense affecting interstate commerce, in violation of Title 18, United States Code, Section 1029(a)(2).

COUNT THREE
[18 U.S.C. § 1709]

On or about May 21, 1986, in the Western District of Texas, Defendant,

FRASIEL. L. HUGHEY,

being an employee of the United States Postal Service, did embezzle a letter which had been entrusted to him, and which had come into his possession intended to be conveyed by mail, the said letter being addressed to T. C. Morton, 8500 Nairon, #308, Houston, Texas 77074, in violation of Title 18, United States Code, Section 1709.

COUNT FOUR
[18 U.S.C. § 1029(a)(2)]

That on or about October 18, 1985, in the Western District of Texas, and elsewhere, Defendant,

FRASIEL L. HUGHEY,

did knowingly and with intent to defraud use an unauthorized access device, to-wit: MBank Mastercard Credit Card Number 5417-1260-0013-9427, issued to Hershey Godfrey, 504 Cypress, Crosby, Texas 77532, and by such conduct did obtain things of value aggregating more than $1,000.00, such offense affecting interstate commerce, in violation of Title 18, United States Code, Section 1029(a)(2).

COUNT FIVE
[18 U.S.C. § 1709]

On or about September 1, 1985, in the Western District of Texas, Defendant,

FRASIEL L. HUGHEY,

being an employee of the United States Postal Service, did embezzle a letter which had been entrusted to him, and which had come into his possession intended to be conveyed by mail, the said letter being addressed to Bob Saunders, 846 Oak Bluff, Lancaster, Texas, in violation of Title 18, United States Code, Section 1709.

COUNT SIX
[18 U.S.C. § 1029(a)(2)]

That on or about October 31, 1985, in San Antonio, in the Western District of Texas, and elsewhere, Defendant,

FRASIEL L. HUGHEY,

together with CLARENCE E. THOMPSON, named herein as a principal, but not as a co-defendant, did knowingly and with intent to defraud use unauthorized access

devices to wit: MBank Mastercard, Credit Card Number 5417-1260-0013-9427, issued to Hershey Godfrey, 504 Cypress, Crosby, Texas 77532, and MBank Mastercard, Credit Card Number 5245-0064-1911-5440, issued to Bob Saunders, and by such conduct did obtain things of value aggregating more than $1,000.00, such offense affecting interstate commmerce (sic), in violation of Title 18, United States Code, Section 1029(a)(2).

/s/ EP Fulton
FOREMAN

HELEN MILBURN EVERSBERG
United States Attorney

By: /s/ Daniel E. Maeso
DANIEL E. MAESO
Assistant United States Attorney

FEDERAL PUBLIC DEFENDER
WESTERN DISTRICT OF TEXAS
October 20, 1986

LUCIEN B. CAMPBELL
FEDERAL PUBLIC DEFENDER

Honorable H. F. Garcia
United States District Judge
Western District of Texas
John H. Wood, Jr. U.S. Courthouse
655 East Durango Boulevard
San Antonio, Texas 78206

Re: *U.S.A. v. Frasiel L. Hughey*
Cause No. SA-86-CR-162

Dear Judge Garcia:

This is to advise the Court that the parties have arrived at the following plea agreement:

1) The Defendant will plead guilty to count four of the second superseding indictment charging him with Credit Card Fraud, in violation of 18 U.S.C. § 1029(a)(2).

2) The government will, at the time of sentencing and with leave of the court, dismiss the remaining counts of the second superseding indictment as well as the two previous indictments.

3) The government agrees not to prosecute the Defendant for any other offense arising in the Western District of Texas as part of the scheme alleged in the indictment.

This constitutes the agreement in its entirety.

Respectfully submitted,

/s/ Lucien B. Campbell
Lucien B. Campbell
Federal Public Defender

LBC:ip
cc: Daniel E. Maeso, Assistant
United States Attorney
Frasiel L. Hughey

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION
(Caption omitted in printing)
(Transcript of Proceedings of
October 27, 1986) (p. 10)

* * *

[10] THE COURT: Is there a question of restitution in this case, Mr. Maeso?

MR. MAESO: I believe the law would apply, Your Honor.

THE COURT: All right. Mr. Hughey, do you understand also that in addition to any term of imprisonment or fine imposed by the Court for the offense to which you are pleading guilty, you may be required to make restitution in the form of money for any property loss suffered by the victim as a result of this offense. Do you understand that?

MR. HUGHEY: Yes, Your Honor.

* * *

[11] THE COURT: All right. Mr. Maeso, what in summary would be the Government's evidence as to the charge to which this Defendant has pled guilty?

MR. MAESO: Yes, Your Honor. If the case went to trial, the Government would show that prior to October 18, 1985, [12] MBank mailed to Mr. Hershey Godfrey at 504 Cypress, Crosby – Cypress Street in Crosby, Texas, MasterCard number 5417-1260-0013-9427, that written on the outside of the envelope was a notation, as it is written on all MBank credit cards, that it was not to be returned –

that it was not to be forwarded to the Defendant's address – to the recipient's address if not received by him.

The Government would show that at the time the card was mailed, this Defendant was employed by the United States Postal Service in the downtown post office here in charge of rifling, that is, pulling these cards that were undelivered from the mainstream of the mail and to deposit them in a particular box number 2426 of the San Antonio Post Office.

The Government would show that Mr. Hughey, in that position, took the undelivered card in the envelope of Mr. Hershey Godfrey, as well as a number of other cards adding more than fifteen in number.

However, with respect to count four of the indictment, the Government would show that Mr. Godfrey, in the company of co-Defendant Thompson – in the presence of co-Defendant Thompson, went to the Windsor Park Mall here and charged and obtained from the Dillards Department Store at Windsor Park Mall, a stereo or equipment in the amount of $1,055.19, that he charged that stereo component to Mr. Hershey Godfrey's credit card that is listed in count four of the indictment, that by [13] such he obtained goods in excess of $1000.

The Government would further show that the offense did affect interstate commerce. That is the factual basis, Your Honor.

THE COURT: Thank you.

MR. CAMPBELL: May I speak to that first, Your Honor?

THE COURT: Go ahead.

MR. CAMPBELL: We are not acknowledging or responding to any facts or accusations outside of count four. Mr. Maeso made some allegations as to some unspecified other cards, but we are not making admissions to anything other than the facts pertaining to count four.

THE COURT: All right. Now that the charge in the indictment and the factual basis have been read to you, Mr. Hughey, I need to ask you again if you understand the nature of the charges against you, sir?

MR. HUGHEY: Yes, Your Honor.

THE COURT: And do you understand that before you can be found guilty of credit card fraud, the Government has to prove those facts just read to you beyond a reasonable doubt?

MR. HUGHEY: Yes, Your Honor.

THE COURT: Do you have any questions concerning the charge or the factual basis?

MR. HUGHEY: No, Your Honor.

THE COURT: Do you agree, then, with the Prosecutor's [14] summary of what you did in this matter as concerned to count number four of the indictment?

MR. HUGHEY: Yes, Your Honor.

* * *

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

(Caption omitted in printing)

(Filed December 9, 1986)

DEFENDANT'S OBJECTIONS TO PROPOSED ORDER FOR RESTITUTION AND MOTION FOR ORAL ARGUMENT ON THE PROPRIETY OF A RESTITUTION ORDER

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Defendant Frasiel L. Hughey, by and through his undersigned attorney and files his Objections to Proposed Order for Restitution and Motion for Oral Argument on the Propriety of a Restitution Order, and would show the Court as follows.

I

On December 4, 1986, Defendant's counsel was informed both orally (by telephone) and in writing of a proposed restitution order in this case in the amount of $147,646.89. Pursuant to the May 24, 1985 order of the judges of this division, Defendant hereby timely files his objections to the proposed order of restitution, on the following grounds:

1) Court records reflect that a related defendant, Clarence Thompson, has already been ordered to make restitution of this same amount of $147,646.89, for the same purpose. While the order was made "jointly and severally" among related defendant's, they are not

named, nor is there any apportionment of the amount of restitution. It is certainly not the intention of the Victim and Witness Protection Act to provide a windfall to crime victims, by multiplying restitution orders of the same amount.

2) The Defendant Hughey is financially unable to make the proposed restitution. Defendant would have to pay almost $30,000 per year for five years to satisfy such an order in full. In order to pay $30,000 per year in restitution, Mr. Hughey's earnings would have to be significantly in excess of that figure, in order to allow for payment of taxes and living expenses. Defendant has no expectation of future earnings as would enable him to make the restitution contemplated.

3) The notice from the Probation Office (a copy of which is attached) does not afford Defendant adequate notice of the basis of the proposed restitution order. Even augmented by the additional details in the Presentence Investigation Report, which was received by Defendant's counsel on December 5, the notice does not meet the requirements of due process. Defendant does not agree to this amount, and requires proof by the government of the basis of any restitution order beyond the $1055.19 transaction which he admitted at arraignment.

4) The proposed restitution amount is excessive and unauthorized because it exceeds the losses of any victims of the offense of which the Defendant was convicted. The count on which the Defendant was convicted refers to a credit card belonging to one Hershey Godfrey, whereas the proposed restitution includes many other credit

cards. Such an order of restitution is not sanctioned by any pertinent authority.

5) The notice from the Probation Office, augmented by the presentence report, does not report whether the victims have received or are to receive other compensation. The Court is required to consider this factor prior to deciding upon a restitution order.

II

Motion for Oral Argument

In view of the objections raised herein, Defendant requests the opportunity to present oral argument at the time of sentencing on the propriety of a restitution order.

WHEREFORE premises considered, Defendant prays this Honorable Court will hear oral argument on these objections, and thereafter decline to order restitution.

Respectfully submitted,

/s/ Lucien B. Campbell
LUCIEN B. CAMPBELL

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

SAN ANTONIO DIVISION

(Caption omitted in printing)

(Filed December 9, 1986)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S OBJECTIONS TO PROPOSED ORDER FOR RESTITUTION AND MOTION FOR ORAL ARGUMENT ON THE PROPRIETY OF A RESTITUTION ORDER

MAY IT PLEASE THE COURT:

NOW COMES Defendant Frasiel L. Hughey, by and through his undersigned attorney and files this Memorandum of Law in Support of Defendant's Objections to Proposed Order for Restitution and Motion for Oral Argument on the Propriety of a Restitution Order and would show the Court as follows:

I

The issue of restitution in this case is governed by 18 U.S.C. § 3651 if it be imposed as a condition of probation, and otherwise by the Victim and Witness Protection Act of 1982 (VWPA), codified presently as 18 U.S.C. §§ 3579-80. The procedure for imposing restitution under the VWPA in this division is set out in this Court's Order of May 24, 1985.

II

Full Restitution Has Already Been Ordered

In Cause No. SA-86-CR-163, United States v. Clarence Eugene Thompson on the docket of this Court, that defendant has already been ordered to pay the full amount of restitution in this case. While this assessment was made "jointly and severally" with other related defendants, there was no apportionment among defendants. It is not clear how much of the total Mr. Thompson was to pay.

The Act provides, with an exception not pertinent here, that "The court shall not impose restitution with respect to a loss for which the victim has received *or is to receive* compensation . . . ." This mandatory prohibition would cover the case at bar, since it was not the intent of Congress to provide windfall multiple compensation to victims of crime.

III

The Defendant's Indigency

The procedural section of the VWPA, 18 U.S.C. § 3580, requires the Court to consider, among other things, " . . . the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents . . . ." *Id.*, subsec.(a). All the information available to the Court is to the effect the Defendant is indigent, and has no earning ability such as would enable him to make the proposed restitution or any significant part of it. Whether the Defendant is ordered to make restitution as a condition of probation or under the VWPA, he would have a maximum of five

years to do so.[1] Mr. Hughey is a young man (24 years old) who does not have the qualifications or experience to obtain the high paying job necessary to make restitution in this case. Furthermore, in seeking employment Mr. Hughey will be laboring under the disability of his criminal record.

It would be a vain thing to order a person of Defendant's means to make restitution as proposed. While a restitution order under the VWPA must be made a condition of probation or parole, any revocation proceedings for non-payment must consider the defendant's ability or inability to pay. 18 U.S.C. § 3579(g). *See also Bearden v. Georgia*, 461 U.S. 660, 667-68, 103 S.Ct. 2064, 2070, 76 L.Ed.2d 221 (1983) ("[I]f the State determines . . . restitution to be the appropriate and adequate penalty for the crime, it may not thereafter imprison a person solely because he lacked the resources to pay it.")

A restitution order as proposed carries little prospect of success, but a significant danger of wasting the time and resources of the Court, counsel, the Probation Office, or the Parole Commission.

---

[1] Title 18 U.S.C. § 3651 provides in part: "The period of probation, together with any extension thereof, shall not exceed five years." The VWPA provides that if the Court requires a person to make restitution within a specified period, the end of such period shall not be later than "five years after the end of the term of imprisonment imposed, if the court does not order probation . . . ." 18 U.S.C. § 3579(f)(2)(B).

IV

The Proposed Restitution is Excessive and Unauthorized

The amount proposed in the notice from the Probation office ($147,646.89) exceeds the Court's restitution authority in this case. The VWPA provides in pertinent part that "The court, when sentencing a defendant *convicted of an offense* . . . may order, in addition to or in lieu of any other penalty provided by law, that the defendant make restitution to any victim *of the offense*." 18 U.S.C. § 3579(a)(1). The offense of which the Defendant was convicted was credit card fraud with a certain credit card issued to one Hershey Godfrey. Restitution is accordingly limited to that offense. *United States v. Barnette*, 800 F.2d 1558, 1571 (11th Cir. 1968) ("The amount of restitution under 18 U.S.C. § 3579(b)(1) (1982) or 18 U.S.C § 3651 (1982 & Supp. III 1986) may not exceed the actual losses flowing from the offense for which the defendant has been convicted.") To the same effect is *United States v. Durham*, 755 F.2d 511, 512 (6th Cir. 1985) ("A natural construction of this language [§3579(a)-(1)] would require that the defendant make restitution only to victims of the offense for which he was convicted.")

V

Basis for Restitution Not Established

The Defendant has not admitted to any amount other than the $1055.19 transaction which was the basis for Count Four which he pled to. The Defendant objects to the amount shown in the letter notice from the Probation Office, and to the amounts shown in the presentence

report. What has been shown to the Court is no more than a list of credit card holders, a list of three card-issuing financial institutions, with a total loss for each. The government is required to demonstrate the amount of the loss sustained by a victim of the offense by the preponderance of the evidence. 18 U.S.C. § 3580.

Counsel believes the amount noticed by the Probation Officer is the sum of a very large number of transactions attributed to the Defendant by the investigative agency. They extend over a long period of time and wide geographic area, including multiple judicial districts. Restitution should be ordered to the extent "the imposition of such order will not unduly complicate or prolong the sentencing process." 18 U.S.C. § 3579(d). Not only would it be illegal to order restitution beyond the count of conviction (See part IV above), but to attempt to do so would grossly complicate and prolong the sentencing process.

VI

Other Compensation

Under the statutory scheme, the "court shall not impose restitution with respect to a loss for which the victim has received or is to receive compensation . . . ." 18 U.S.C. § 3579(e)(1). Also, the Court is required to consider the "amount of the loss sustained by any victim . . . ." 18 U.S.C. § 3580(a). If the victim financial institutions were to receive compensation from insurance or cardholder deductibles on loss, this would affect the mount of restitution. *See United States v. Durham*, 755 F.2d 511, 514-15 (6th Cir. 1985).

Respectfully submitted,

/s/ Lucien B. Campbell
LUCIEN B. CAMPBELL
ATTORNEY FOR
DEFENDANT

[Certificate of Service omitted in printing]

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

SAN ANTONIO DIVISION

(Caption omitted in printing)

(Filed December 22, 1986)

GOVERNMENT'S RESPONSE TO "DEFENDANT'S OBJECTIONS TO PROPOSED ORDER FOR RESTITUTION"

(INCORPORATING BRIEF WITH AUTHORITIES)

To THE HONORABLE JUDGE OF SAID COURT:

The United States, through its undersigned counsel, hereby request that this Court overrule the defendant's objections and assess against this defendant joint and several liability for the complete amount of restitution due in this cause. In support of its position, the United States would show the Court as follows:

I.
FACTS

As the evidence would show, this defendant was employed by the downtown post office from June 25, 1985 unitil (sic) December 20, 1985. While there, the defendant developed a scheme by which he would steal credit cards which were returned to the post office undelivered. By this scheme, he pilfered some 30 credit cards, used them or caused them to be used, with intent to defraud and caused a financial loss to the banks in excess of $147,646.89.

II.
JOINT AND SEVERAL LIABILITY

As the defense correctly relates, related defendant Clarence Thompson has been ordered to make restitution for the full amount $147,64€.89, "jointly and severally" with his cohorts in crime. The defendant notes that the Court has not apportioned liability among the jointly and severally liability defendants. This Court is not required to make any such apportionment. *United States v. Tzakis*, 736 F.2d 867, 871 (2nd Cir. 1984). *Tzakis*, makes clear that co-defendants may be properly held jointly and severally liable for restitution for the full amount of a loss cause by their criminal conduct, as long as the crime victims do not in fact recover more than their actual lossess (sic). *Id.* This Court need not, nor should it be called upon, to predict how much each jointly and severlly (sic) liable defendant will be able to pay as restitution in coming years. This Court has already seen fit to hold a related defendant jointly and severlly (sic) liable for the full amount with related defendants, and the defendant now before the Court should be treated no differently. The defendant should be required by this Court to make his best efforts to make his crime victims whole.

III.
THE DEFENDANT'S INDIGENCY

The Court is not prohibited from imposing restitution on a defendant who is indigent at the time of sentencing. *United States v. Ruffen*, 780 F.2d 1493,1494-95 (9th Cir. 1986). It remains to be seen whether the defendant, using his best efforts, will be able to obtain all or a substantial part of the total restitution due within the span of several

years. Again, a related defendant has been called upon to make such an effort, and this similarly situated defendant should not receive special treatment.

IV.
BASES FOR AMOUNT OF RESTITUTION

The United States is prepared to demonstrate by preponderance of the evidence, that the victims of the defendant's criminal conduct sustained a loss of $147,646.89. *See* 18 U.S.C. § 3580. We do not anticipate that our evidence would "grossly complicate and prolong the sentencing process."

To begin with, restitution is appropriate for injury suffered as a result of actions that surround commission of the defendant's criminal offense, regardless of whether those actions are elements of the offense charged. *United States v. Durham*, 755 F.2d 511, 513 (6th Cir. 1985). As the plea agreement in this case reflects, the defendant had engaged in a credit card fraud "scheme.", assists the government's evidence establishes that the defendant participated in a scheme to defraud through the use of credit cards, restitution is not limited to amounts directly attributable to the particular count which was the subject of the defendant's guilty plea [check cites closely and elaborate, Also, Dan check on insurance and cardholders deductibles, as alleged in "VI" of the defendant's submission, so that you can explicitly counter that in your response.] In view of the forgoing, the United States urges this Court, after hearing oral argument, to order the defendant to pay restitution in the amount of $147,646.89 for which he should be jointly and severlly (sic) liable with his crime partners.

Respectfully submitted,

HELEN MILBURN EVERSBERG
United States Attorney

By: /s/ Payne F. Speck
DANIEL E. MAESO
Assistant United States

[Certificate of Service omitted in printing]

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

SAN ANTONIO DIVISION

(Caption omitted in printing)

DEFENDANT'S REPLY TO THE GOVERNMENT'S RESPONSE TO DEFENDANT'S OBJECTIONS TO PROPOSED ORDER OF RESTITUTION

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Defendant Frasiel L. Hughey, by and through his undersigned attorney and files this Reply to the Government's Response to Defendant's Objections to Proposed Order of Restitution and would show this Honorable Court as follows.

I

In paragraph IV of its response, the government cites *United States v. Durham*, 755 F.2d 511 (6th Cir. 1985) in support of its position that Defendant is liable for a restitution order pertaining to many different credit cards, even though he has only been convicted of an offense involving one credit card. The *Durham* case, however, illustrates the precise point of law raised by Defendant in his objections.

In determining what restitution may be ordered to "any victim of the offense", 18 U.S.C. § 3579(a)(1), there are two terms which must be defined. The first question is what is the offense, and the second is who are victims of that offense. While the courts have defined the second term expansively, the first term has been narrowly restricted to the offense of conviction.

The *Durham* case was a prosecution fro bank robbery, and the evidence showed the defendant destroyed a vehicle by arson "during the course of the robbery." 755 F.2d at 512. The court held the insurer of the automobile was a victim of the robbery, for restitution purposes, because the destruction of the automobile occurred as a result of, and during the course of the robbery. First, however, the court determined that the term "offense" means only the offense of conviction.

In the instant case, the government suspects a number of illegal credit card transactions on a number of different credit cards. Those other cardholders, or their banks, are victims of other offenses, not the offense of conviction, which has to do only with the Hershey Godfrey credit card.

II

The government further urges, without citation of authority, that because the government contends there was a credit card fraud "scheme", Defendant is liable for restitution beyond the count of conviction. The government may be thinking of cases in which the count of conviction is a conspiracy encompassing an entire scheme, or it is an offense which has as an essential element a scheme to defraud, such as mail fraud. The instant prosecution is not such a case. The Defendant stands convicted of one count of fraudulent use of a specified unauthorized access device, namely, the credit card of Hershey Godfrey, in violation of 18 U.S.C. § 1029(a)(2). While the statute permits prosecution for such use during a one-year period, the government chose

to allege only the single transaction of October 18, 1985, which evidence showed amounted to $1055.

III

Because there was no conviction for any scheme, or even a conspiracy involving a scheme, restitution is limited to the offense of conviction, the unauthorized use of the Hershey Godfrey credit card on October 18, 1985. In view of Defendant's indigency, this is an appropriate limitation of restitution.

Respectfully submitted,

/s/ Lucien B. Campbell
LUCIEN B. CAMPBELL

ATTORNEY FOR
DEFENDANT

[Certificate of Service omitted in printing]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION
(Caption omitted in printing)
(Transcript of Proceedings of March 27, 1987) (pp. 4-30)

* * *

[4] THE COURT: 86-CR-162, United States of America, versus Frasiel L. Hughey.

MR. HARDY: Michael Hardy, for the United States, Your Honor. And we are ready to proceed with sentencing.

MR. CAMPBELL: Lucien Campbell for Mr. Hughey, Your Honor, and he is present and we are ready to proceed.

THE COURT: All right. Go ahead, Mr. Campbell. What do we have here.

MR. CAMPBELL: Well, sir, we have sentencing. We have received a pre-sentence report and we'll speak to that. We also have an issue of restitution to be resolved. The probation office sent us a letter at an earlier date and I filed objections to the proposed restitution. The Government filed a response, and I filed a reply to that. And, also, in connection with that, the Government is going to offer a stipulation of the expected testimony that the parties have entered into that will bear on restitution. And will also bear on the total amount involved in these transactions and present a different figure than the one in the pre-sentence report.

THE COURT: Well, I have – somebody handed to me stipulations – is that agreed upon then?

MR. CAMPBELL: Yes, Your Honor. Mr. Hardy is going to offer that, and we have no objection to it. I should make it clear that that is not a stipulation of fact. It is a stipulation as to expected testimony. The law places the burden [5] on the Government to show by a preponderance of the evidence the proper basis for restitution. And they have prepared a stipulation as to what they expect their witnesses to say, and we have no objection to the admission of that stipulation. But as we speak, therein, it is not a stipulation of fact and Mr. Hughey is not making any admission of any fact contained therein for reasons which I will explain.

There is a plea agreement in this case in this district. It involves this indictment and some previous indictments. But the Government through their representative and case agent and through prior attorneys representing the Government, it represented to Mr. Hughey that he may be subject to prosecution in other districts and other jurisdictions. So, on my advice, Mr. Hughey is not making any statement or admission as to any facts outside the offense of conviction in the event of a conviction in this case.

THE COURT: Well, are we going to have to have a hearing or what?

MR. CAMPBELL: Well, we are having a hearing, Your Honor, I don't think it's going to be necessary to call a lot of witnesses because we have stipulated to the testimony that the Government wishes to offer. There are some issues to be resolved on the question of restitution

and I – I would certainly like the opportunity to speak to those. Does the Court want to pick up the restitution matter first or the [6] pre-sentence report or –

THE COURT: I think we will because if I have to read something or take it under advisement, I just can't –

MR. CAMPBELL: Very well, Your Honor.

MR. HARDY: Well, Your Honor, the Government would offer the stipulation which has been marked as Government Exhibit 1 in evidence. It is offered in lieu of live testimony and various witnesses that the Government would call. And this is a time saving effort.

THE COURT: Now, this is – what – the stipulation that you are now offering is what the Government would show the Court as true?

MR. HARDY: That's correct, Your Honor.

THE COURT: All right. What do you have to say to that, Mr. Campbell?

MR. CAMPBELL: All right, Your Honor. First, I will address this with the written memorandum that I submitted in the earlier stages of this sentencing. But I believe there's an important legal issue on the scope of restitution under the – Victim and Witness Protection Act codified as 3579 and 3580. Under 3579 – 3579 and 80, the first subsection says that when a person is convicted of an offense, the Court may order restitution to any victim of the offense. Now, there are two questions there. What is the offense and who is a victim of the offense. And in my examination of these issues, I find that the [7] court defines the term victim very liberally. In other words, the question of who may be a victim of the offense is given a

pretty expansive reading for a definition. But the question of what is the offense, is the offense of conviction.

Now, there are cases and I believe that some of them are before the Court, where restitution has been found proper outside of the offense of conviction. And I understand those cases, and I believe they are properly decided. But I think the Court will find in every instance it is a situation where the offense of conviction necessarily takes in matters and amounts beyond what is alleged in that count of the indictment. For example, the number of cases where the offense of conviction is a conspiracy. The defendant is convicted of conspiracy. So the conspiracy included the whole plan or the whole scheme. And, therefore, restitution of the whole amount involved was held to be proper.

There are other cases that are under the mail fraud or wire fraud statutes which the Court is aware involves an element of the offense. That there was a scheme or artifice to defraud, so a person who is found guilty of mail fraud or wire fraud has been found guilty, number one of having devised and engaged in a scheme to defraud. And in those cases the courts have said that restitution for the amounts involved in the whole scheme, not just that particular wire transmission, are proper. And I certainly understand those cases. But, by contrast, the [8] conviction – the conviction in this case Count 4 of the last superseding indictment was for one violation of Title 18, Section 1029, credit card fraud. It alleges use of one particular credit card which was issued to Hershey Godfrey on one particular day, October the 18th, 1985. And the matters that the Government has presented by way of their stipulated testimony, relate to other offenses on

other credit cards. That is other uses at other times and places. That, in fact, some of them in other judicial districts were not even prosecutable before this Court. The Government chose to prosecute under Title 18, Section 1029 and I think the offense of conviction is simply different from a conspiracy that takes in a whole plan or a mail fraud that takes in the whole plan. And I think that restitution is not legally proper beyond Hershey Godfrey credit card.

Now, in the written filings that I made, I urge that it be limited to that transaction of the indictments which was a little bit over a thousand dollars. I certainly can see an argument that restitution might be proper under the act for every use of that particular credit card that is even outside of that indictment, but limited to that credit card which was the basis of conviction. And the amount involving that credit card was $10,412.00. And I would recommend that amount to the Court as being the proper amount of restitution for a number of reasons. One, I believe it is within the law. And I believe [9] the other credit cards are not within the law.

I see other points that I would like to mention, Your Honor. The stipulation presents three types of proof to the Court. Paragraph 1-A says the Defendant, Mr. Thompson – Mr. Jones would testify that Clarence Thompson, who is another defendant that the Court sentenced last December, would say that Mr. Hughey gave Thompson these 15 cards listed here. Now, I understand the theory whereby Mr. Hughey is ultimately responsible – assuming this is proper restitution – the cards that he gave Thompson, but the facts are different on the next page. Item number two says that a postal inspector would

testify that a business person identified the Defendant as the individual who had used a James R. Windom card. Well, I believe that this is significantly different. In other words, the Defendant using it would pay a business person on one occasion, I don't believe is a proper basis for holding him liable for the entire amount that may have been used on that card.

And in the same matter, down in Paragraph 4-B with the level quoted there is that the business persons identified to the Defendant in possession of two credit cards. And, there again, I think that is different. It does not rise to the same level as the Government presenting evidence that the Defendant provided the cards to someone else to use which would arguably make him responsible for all the use on them.

And then the other matter that concerns me, Your Honor, is [10] that a lot of these usages, and I cannot tell the Court how many of – or what part it is, but I know from the discovery that has been provided me here that certainly some of these cards, the Chapman and Wharton cards down in Paragraph 4-B, the Government believes that they were used in some other judicial district outside of the Western District of Texas. That use would not be prosecutable here. Under their position, it may be prosecuted in some other district at some future date and would then be subject to a restitution order upon conviction of some other district. So, there again, I don't think it's proper to even consider restitution outside this district even if the Court should look beyond the Hershey Godfrey credit card, the one that is the basis of conviction.

Another matter, Your Honor, is that the Court is required to consider the financial condition of the Defendant under Title 18, Section 35-A, Subsection A in determining whether to order restitution and the amount, if restitution is ordered, the Court shall consider it. The Court is required to consider the financial resources of the Defendant and the financial means and earning ability of the Defendant.

In this connection, Your Honor, we would stand on the pre-sentence report information as to employment earnings history and present financial condition. I don't think there is any dispute as to these matters, and I would ask the Court to accept that information as our showing as to Mr. Hughey's [11] financial condition. It relates on Page 9 and 10 of the pre-sentence report that looking back over the last six years from about age 19, I would say, to age 25 when Mr. Hughey entered the work force where he worked as a cook for $6.50 an hour, worked as a laborer in '83 and '84. In '85, worked as a department store – in a department store earning $4.00 an hour. His employment at the post office from the latter part of 1985 was at $5.00 an hour. He operated a business during half of 1986 – a video business, and earned about $3,000.00, to be an annual rate of $6,000.00 if it had lasted that long which is even lower earnings than those hourly wages. The report also reflects on the next page that his only asset is a vehicle worth about $1,200.00 against which he has liabilities of $8,100.00. Other debts with his own – on his own credit cards. So, Mr. Hughey is already in the hole. He has never earned any substantial sum of money. When he is released from incarceration, he hopes to complete his education, but whether he is going to

school or commencing work right away, his earnings are not going to be at a high level. And this simply puts a practical limit on the amount of restitution that Mr. Hughey can order. The probation officer mentioned on Page 11 of the report that the probability of making full restitution is unlikely in view of the asset that Mr. Hughey has and I think – seem to think that is accurately quoted, and the Court is required to consider these things, and I think that what they [12] tell the Court is that some smaller amount of restitution is proper. We are not saying that there should be no restitution. There certainly should. But I think the Court should approach it in a practical way and assess a sum that the Defendant can and will pay. The sum that is reasonable and require him to pay because the limit of the time that the Court can give him under this law is five years from the expiration of his term of imprisonment. And I think the sum of $10,412.00, which is the total amount on the Hershey Godfrey card, is legally correct under the law. That it is in keeping with the financial resources of the Defendant and his expected future earnings and and the amount that he could repay and would and should properly be required to repay as a condition of parole and is a – is a debt that's enforceable.

There is one other matter involved here on the question of restitution which I would like to address and that is the fact that another defendant related to this case was sentenced by this Court back on December 8th. That is Clarence Eugene Thompson under cause number SA-86-CR-163. And looking at the judgment, I see that the Court ordered restitution in the amount of $147,646.89 which was the gross amount suspected. Now, having examined

the basis for this, I suspect that that amount is excessive. But I certainly don't think that the mere fact that an excessive amount was ordered and another defendant is reason to continue to order an excessive amount in this case and [13] I know that the Court would not approach it that way. There is not only Mr. Hughey to be sentenced in this case, but I will tell the Court that there is another defendant named Thomas Baetty (sic) who has been arrested who is also involved in these matters and will probably come before this Court and if he is found guilty for entry of a restitution order.

So, I believe that all three need to be fair, and I'm certainly interested in Mr. Hughey's being fair and reasonable. And if the Court should believe that the amount ordered in Mr. Thompson's case last December is not correct, I believe the Court has the full power an authority to adjust it under Rule 35 either with or without a motion. And I found a case that supports that view, United States versus House, a 7th Circuit case reported at 808 Fifth Circuit 508 where the 7th Circuit reviewed the propriety of the amount of restitution on a Rule 35 motion. So, if the Court should order a lesser amount in the case of Mr. Hughey which is reasonable, the Court would have full power to make any adjustment in the interest of justice in the case of Mr. Thompson.

THE COURT: All right, sir. Mr. Hardy?

MR. HARDY: Yes, Your Honor. First of all, the Government would like to formally offer Government's Exhibit Number 1 which is the stipulated testimony that the Government witnesses would provide.

(Government's Exhibit Number 1 offered into evidence.)

[14] MR. CAMPBELL: We have no objections, Your Honor.

THE COURT: All right. It will be received into evidence.

(Government's Exhibit Number 1 received into evidence.)

MR. HARDY: Your Honor, by way of response to Mr. Campbell's observations, we would first urge that the stipulation is more than sufficient under the preponderance of the evidence standard to establish the Defendant's restitutionary obligations as a result of his criminal conduct in this case. We would refer the Court to United States vs. Hill which is a 10th Circuit 1986 case, a copy of which has been provided the Court in advance and as well to Mr. Campbell. The rationale articulated in Hill rejects the approach you have just heard. And the holding of the Court in Hill is that the amount of restitution in a particular case under the Victim and Witness Protection Act need not more – shouldn't be limited to the particular count of conviction. The Court has taken some pains to distinguish between the Victim and Witness Protection Act and the Federal Probation Act. The Federal Probation Act the Court in hill indicates – provides by express language that loss is limited to the offense for which – for which conviction was had. But no similar limiting language appears in the Victim and Witness Protection Act. The Court also notes the discussion of the legislative history with respect to the Victim and Witness Protection Act and the tenor of the legislative history is that [15] the – every possible effort within the – is supposed to be undertaken to make the victims of crime whole. And the

Federal Government is suppose to take all reasonable efforts to make sure that crime victims are placed in a – at least to bring greatest extent possible, in a position of well-being that they enjoyed prior to the criminal conduct by the Defendant.

Mr. Campbell indicated that the Government is limited to the one particular count of the multi-count indictment to which the Defendant pleaded guilty and Hill's response to that argument is as following: "We believe limiting a victim's recovery to the amount charged in the indictment or to particular counts of the offense is unwarranted given the compensatory objectives of the V.W.P.A. The decision of the prosecutor for indicating a Defendant and the manner in which a Defendant is indicted have little if anything to do with the objectives of the V.W.P.A. For instance, a prosecutor's decision to charge the Defendant for one more count in an offense is discretionary. And that discretion is exercised taking into consideration law enforcement objectives which have nothing to do with the Congressionally objectives of compensating crime victims."

The Court goes on to further indicated (sic) that "any amount that might be specified in an indictment count should not be binding in any way on the Court in determining how much resti – in determining how much restitution to order." Because such statements in the indictment are often included to satisfy [16] jurisdiction requirements.

The Government would note to the Court another fundamental difference between the Federal Probation Act which appears to be at the heart of the cases which

the defense has cited in its response to the proposed restitution order and the Victim and Witness Protection Act. That is under the Federal Probation Act, restitution cannot be ordered if incarceration is ordered on a particular count. On the other hand, under the Victim and Witness Protection Act, the remedy of restitution operates in tandem with any other remedy that may be at the Court's disposal.

We hope that it's clear then, that the purposes and the language of the Victim and Witness Protection Act differs from the more restrictive approach taken by the Federal Probation Act. And the Court in Hill notes that Congress must have been aware when it enacted the the (sic) Victim and Witness Protection Act of the limitations that were present in the Federal Probation Act. And the V.W.P.A. does not mirror the language of the Federal Probation Act.

Mr. Campbell alluded to a series of cases in which the courts have allowed restitution to exceed specific counts in the indictment on which the Defendant was convicted when there is a scheme to defraud or in a conspiracy type of case. My research has indicated that most of these cases have been decided under the Federal Probation Act. We would urge to the Court that a [17] scheme to defraud has been alleged and shown in this case, Your Honor. First of all, the plea letter submitted – drafted and submitted by the defendants in this case recognizes that the indictment does charge a scheme. The particular counts of the multi-count indictment refer to embezzlement of credit cards and unauthorized use of credit cards. And the indictment makes clear that we are talking about

more than one credit card. The allegations in the indictment are on or about. So there is no limitation to any one particular time or any one individual transaction.

Further, there are counts of the indictment which refer to the fact that over $1,000.00 in unauthorized charges were run up. So clearly, Your Honor, the Government is not limiting itself to any particular figure. The proper factual basis for the guilty plea as to this particular Defendant, Mr. Maeso, who was representing the Government at that time indicated that this Defendant was responsible for embezzling over 15 credit cards betraying his position of trust at the post offices where he worked. Therefore, the Defendant was again placed on notice that his restitutionary responsibility could certainly exceed any one particular count that might be specified in the indictment.

The Defendant has given further notice as a result of statements made in a pre-sentence report and even further notice as result of representations made in this stipulation testimony [18] to which the Defendant has now agreed is admissible and properly considered by this Court.

We believe, therefore, Your Honor, that as result of the indictment itself, as a result of the proffered factual basis for the guilty plea in this case, as result of the pre-sentence report, and as a result of the evidence that is specified in the stipulation that the Defendant has been placed on ample notice of his restitutionary responsibility here and that that restitutionary responsibility is no way confined to any one particular indictment here.

We will further echo, Your Honor, that just as in the Federal Probation Act cases that refer to scheme and to fraud that the multi-count indictment that was facing this particular Defendant should be regarded more as with – each count being viewed as one overt act in furtherance of a scheme to defraud. Again, certain indictment counts mentioned the Defendant's intent to defraud through his unauthorized use of access devises, namely credit cards in this case.

The defense made reference to – seemed to indicated (sic) that there may be a difficulty as to the Government showing causation. The Defendant's causation of a particular lawsuit, specifically referring to Government evidence that would relate to the Defendant's use of a particular credit card. The – Mr. Campbell properly indicated that the cases take a very expansive role as to defining what victim of an offense is and what that [19] term mean.

And also, these cases take a very broad view of what causation means in the restitution context. By virtue of the Defendant's intervention, his stealing these credit cards, his having these credit cards in his possession, he was responsible for running up unauthorized bills on these cards. Even if he was not the one who did it – the charging, he had no business having these cards in his possession and the stipulation makes clear that time and time again this particular Defendant stole the credit cards from the post office where he works. We see no difficulty as to causation. And we see no difficulty either, Your Honor, as to victim. We are seeking restitution as to only one victim, MBank U.S.A. Whose credit cards were pilfered and were used in an unauthorized fashion.

THE COURT: In what amount, sir?

MR. HARDY: We have agreed to a compromised figured of $90,431.00.

We further note, Your Honor, that concern of double recovery should be dispelled. The V.W.P.A. makes clear that no victim of restitution can be compensated twice for a particular loss. So we see as a illusory any difficult (sic) concerning the victim's double recovery in this case. And it is conjectural, indeed, whether the Defendant will, in fact, be charged for related misconduct in any other jurisdiction.

THE COURT: Well, I mean if in the pre-sentence report, [20] the figure I have here is that the restitution is – total of restitution is $147,646.89. The stipulated – stipulations do not back that up, do they?

MR. HARDY: We have agreed to a lesser amount, Your Honor.

THE COURT: On the front of the case that you gave me, it says that the Court must determine – the Court must determine – there must be a factual determination by the Court, right? From the preponderance of the evidence?

MR. HARDY: Yes, Your Honor. And preponderance of the evidence that we have presented backs-up fully the $90,000.00 figure that we have offered here.

I would note further, Your Honor, that the Government is endeavoring to be entirely reasonable. We do recognize that the Defendant is of limited means and the $90,000.00 figure mentioned in the stipulation is very

substantial restitution and would certainly indicate the Government's interest.

We would further note, Your Honor, that as to Mr. Campbell's reference to the Defendant's financial condition, that there is no futility in ordering a very sizable restitution amount. That Congress in its wisdom has given a Defendant time after he has served prison to pay back the losses that he has caused, we would urge that the Defendant – that the responsibility for the loss be placed squarely on the Defendant's shoulders where they belong.

[21] That – and there is a case which has an excellent discussion of the relationship of indigency to restitution orders, United States versus Atkinson, 788 Fed Second 900, a 1986 Second Circuit case. That indicates that an indigent should not be en (sic) encouraged to evade his responsibility to make the victims whole through an order of restitution that is neither or nonexistent because that completely eliminates any incentive for the Defendant to make the victim whole in the events that he subsequently comes into resources that would enable him to make that victim whole. We would urge that the Court is not a seeer (sic). That he cannot fortell what the Defendant's precise financial condition will be in a number of years. The Defendant may be successful in a lottery, perhaps he will be able to harness his ingenuity and his efforts in the criminal area and gear those toward legitimate business activity that would yield substantial benefits which in turn could be used to pay the victims in this case.

We would further note, Your Honor, that another Defendant who appeared before you, Clarence Thompson, has been assessed a very sizable restitution amount. And the Defendant before you now is the individual who provided that Defendant with credit cards. And that certainly we would echo the sentiments of the pre-sentence report and inferences to be drawn from the stipulation that this particular Defendant is highly culpable and that a sizeable restitution order is warranted in this case.

[22] THE COURT: All right.

MR. CAMPBELL: May I reply, Your Honor?

THE COURT: Yes, sir.

MR. CAMPBELL: I didn't want to interrupt Mr. Hardy's remarks. He said something to the effect that we have agreed on the figure of $90,000.00. I'm sure it's clear that I'm not agreed that that's the proper amount of restitution for this Court to order. I'm urging the Court to look to the figure of $10,412.00 which is the credit card involved in count of the conviction.

We agree that the $90,000.00 figure is the Government's showing – the Government's evidence as to the total involved and other cards where the Government suspects the Defendant's involved. It is smaller than the figure in the pre-sentence report because we challenged them and we objected to it. I believe that the level of suspicion on someone else filling the role, the level that is proper to be included is the total of his behavior and in exchange for our entering into the stipulation relieving the Government of the obligation of calling witnesses, we

agreed on the smaller figure of $90,000.00 to replace the amount of the pre-sentence report and, in fact, the pre-sentence report should be rewritten to reflect that.

Responding to Mr. Hardy's argument, Your Honor, in the Hill case that he mentioned, I think it's highly significant that he (sic) the offense of conviction and the other things that were brought [23] in restitution were identical. In other words, the theft of Ralgro steroid implants from the same victim. In the offense of conviction and in the restitution outside the conviction. It's the very same thing. Same victim and same theft.

And in this case, there are other offenses which are separate violations involving different credit cards used at different times and places. And I think there is simply a difference. Mr. Hardy has spoken to the probation officers in 3651 in the Victim and Witness Protection Act 3579 and 80. And I certainly know the difference between the two. And contrary to Mr. Hardy's assertions, I believe, on Page 4 of the memorandum of my objections of the cases that we cite, are under the new law United States versus Barnett an 11th Circuit case or sister Circuit published in '86, I believe a conviction that was transposed in this brief of '68, but was reported in 800 Fed Second 1558, "the amount of restitution under 18 U.S.C.3579-B or 3651, but dealing with this law may not exceed the actual losses flowing from the offense for which the defendant has been convicted."

The Durham case, a 6th Circuit case, decided in 1985 after this law, citing this law says "that neutral construction of this language 3579-A1 would require that the

Defendant make restitution only to victims of the offense for which he was convicted."

Mr. Hardy refers to the plea letter which uses language part [24] of the scheme alleged in the indictment. The purpose of this plea letter is to protect the Defendant of his being charged with any other offense that could be related to all of the indictments in this case, the original and the superseding.

Naturally, this language is expansive to carry out the intent of the parties to protect the Defendant. It does not enlarge the indictment. It certainly doesn't add anything to the offense of conviction. If you look at the indictment – indictments as a whole, one may infer some scheme, but the point is the offense of conviction does not carry any scheme as an element of the offense like mail fraud or like conspiracy. And the plea letter cannot change or enlarge or expand upon the offense of conviction.

Mr. Hardy speaks of some several count referring to the course of conduct over a period of time, that's in the statute, however, in the count of conviction, we did not allege it that way. They alleged one particular use of the card on one particular date, October 18, 1985, and did not allege over a period of time and did not allege on or about.

Mr. Hardy refers to the factual basis. I know that we made it very clear at that time, Your Honor, that Mr. Hughey was not admitting to any fact outside of the offense of conviction for the reasons I have repeated here today.

Mr. Hughey says – or rather Mr. Hardy says that the P.S.I. is a basis for this. We promptly filed our objections to the [25] amount in the P.S.I. We timely filed them in accordance with the plan in this Court. Mr. Hardy urges larger restitution because Mr. Hughey may win the lottery or something like that. I don't think the Court should look at speculative things like that. The Court is required to look at the financial resources and prospects that Mr. Hughey and I think they dictate a lower amount more in line of the $10,412.00 which I believe is legal.

Your Honor, Mr. Hughey is not trying to evade his responsibility and he has written a statement to the Court. He referred to restitution. I believe he should be required to make some restitution. I believe it should be an amount that is legal and an amount that is realistically possible for him to make when the authorities can require him to make that under the procedures provided in the law. And I believe the amount that I suggest is proper.

THE COURT: All right.

MR. HARDY: Your Honor, may I briefly reply?

THE COURT: It has taken up too much time already. I tell you what I'm going to do, gentlemen. I'm just not going to be be (sic) able to read all of that. This matter was just handed to me awhile ago, all of these briefs and replies and – let me proceed first on the report itself.

Mr. Hughey, this pre-sentence report was prepared for the Court, have you gone over this, Mr. Hughey?

A Yes, sir.

[26] THE COURT: Have you discussed it with your attorney?

MR. HUGHEY: Yes, Your Honor.

THE COURT: Now, do you know of any corrections to this report that you want the Court to know about, for the record?

MR. CAMPBELL: If I may reply, Your Honor?

THE COURT: Go ahead.

MR. CAMPBELL: First, in keeping with our position throughout our Court appearances on this case, Mr. Hughey does not admit or speak to any facts outside the offense of conviction.

Now, on Pages 3, 4, 5, and 11, that is the prosecution version, the victim impact statement and also the evaluated summary toward the end of the report, there are references to other offenses. Some committed in other districts with other credit cards at other times. We are not approving or accepting or admitting any allegations outside the offense of conviction for the very good reason I've already explained to the Court.

THE COURT: All right, sir.

MR. CAMPBELL: As to the total amount which is set out as $147,000.00 – the $147,000.00 figure –

THE COURT: $147,646 –

MR. CAMPBELL: Uhm –

THE COURT: – it's on Page 5.

MR. CAMPBELL: Page 5. Yes, Your Honor.

THE COURT: All right.

[27] MR. CAMPBELL: We do object to that figure for the reason that that was the total amount of the suspected of what everyone was suspicioned. We took it up with the Government and in the interest of shortening this proceeding before the Court, I asked the Government to pull out those matters that they believe that they have sound evidence to the legal standard as to the preponderance of the evidence and they presented us with that $90,000.00 figure – $90,000.00 and change which was in the stipulation.

So, I would ask the Court to direct that the presentence report be rewritten to reflect the amount that the Government is advancing now in the as to which we are – we are not presenting any evidence to challenge as being the proper amount. It could be important further down the road, Your Honor. The parole commission will look to this report in what they call a total offense behavior and make decisions about parole guidelines and I think it's important that that so called total offense behavior be an accurate report, and the number that we have agreed to put before the Court is the Government's version and that is the $90,000.00 and change figure in the stipulation.

THE COURT: Thank you. Is that right, Mr. Hardy?

MR. HARDY: That is correct.

THE COURT: $90,431.00?

MR. HARDY: Yes.

THE COURT: All right. It will be so corrected. All [28] right, sir.

MR. CAMPBELL: Your Honor, a typo on Page 10, Mr. Hughey is 6'1" and not 6'11".

THE COURT: All right.

MR. CAMPBELL: On the salient factor score, I don't agree with every one of these points. This is the probation officers parole guidelines worksheet which is next to the last on my copy. It might be the third from the last in the Court's copy. Item E under salient factor score is an item that requires the person making the assessment to look and see if the Defendant was on probation at the time of the current offense. That score is zero meaning on probation. Your Honor, the date of the offense in this case is October the 18th, 1985, not on or about, but precisely October the 18th, 1985.

The pre-sentence report reflects Mr. Hughey was not placed on probation in state Court until March 27th, 1986, several month (sic) after the offense of conviction. So, I believe, Item E should be scored as one point instead of zero for a total score of seven instead of six.

THE COURT: In other words, that the offense committed was committed – was not –

MR. CAMPBELL: Yes, Your Honor, before – several months before he was placed on probation.

THE COURT: All right. Do you have any objection to that?

[29] MR. HARDY: May I have one moment, Your Honor?

THE COURT: Yes.

MR. CAMPBELL: Your Honor, Mr. Hardy has pointed out to me that there have been about three indictments in this case, the last one a second superseding does say on or about October the 18th and I've been referring to it as precisely October the 18th, but, the fact – the allegation is on or about October the 18th.

Nevertheless, I would submit that there is not any evidence before the Court that it was committed on any other date than October 18th, '85 from the discovery that was made available to me was that it happened exactly on that day. So, I don't believe there is any question that the offense was committed before Mr. Hughey was placed on probation.

MR. HARDY: No objections, Your Honor.

THE COURT: Okay. So it will be one – In other words, the total score will be seven instead of –

MR. CAMPBELL: Yes, Your Honor, that's – that's the way I see it.

THE COURT: Okay. Anything else?

MR. CAMPBELL: No Your Honor.

THE COURT: All right. All of these presentations to the Court will necessitate me preparing a whole new structure of the sentence that I have. And before I do that – I mean – I'll hear allocution on your part and his part at that time.

[30] MR. CAMPBELL: Very well.

THE COURT: We're hard pressed here – Mrs. – Judy.

(Off the record discussion between the Court and the Court Clerk.)

THE COURT: Mr. Campbell and Mr. Hardy and Mr. Hughey, I will reset that for sometime during the week, hopefully I'll just reset the trial that I'm going and proceed from the sentencing. And I will hear allocution from you and from the Government at that time. Okay?

MR. CAMPBELL: I'll be available, Your Honor.

THE COURT: All right. Fine. Thank You.

(Case adjourned.)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION
(Caption omitted in printing)

STIPULATION

TO THE HONORABLE JUDGE OF SAID COURT:

In connection with the determination of the Defendant's responsibility for restitution under the Victim and Witness Protection Act in this cause, the Defendant and the United States agree to the admissibility of testimony set forth below that would have been offered by witnesses for the government:

1. Special Agent Scott C. Jones of the United States Secret Service in San Antonio, Texas, would testify that Clarence Eugene Thompson related that:

Government Exhibit 1

(a) The Defendant gave Thompson VISA or Mastercharge cards issued by MBank USA to the following persons:

1. Jack C. Bradberry
2. Allen Brown
3. Romalie Calder
4. Ernest and Elizabeth Cuevas
5. Hershey Godfrey (to which Defendant pleaded guilty)
6. Carole and Anthony Harrison
7. Ronald W. Kramer
8, 9. Monte Magruder
10. L.C. Miller
11. Wil W. Nefkins (to which Thompson pleaded guilty in Case No. SA-86-CR-163)
12. Mike Ribordy
13. Francis R. Spaulding
14. Tommy Y. Watson, and
15. Larry Willman.

(b) The Defendant admitted getting these credit cards from the San Antonio post office where he worked. When MBank mail containing the cards could not be delivered because the addressees had moved, the mail would be routed to MBank's post office box where the Defendant intercepted it.

2. Postal Inspector Greg M. Castillo of San Antonio, Texas, would testify that a business person identified the Defendant as the individual who had used an MBank Mastercharge Card issued to James R. Windom.

3. Postal Supervisor Charles W. Menear, Jr., of San Antonio, Texas, would testify that the Defendant worked at the downtown San Antonio postal station from June 1985 through December 1985 and that the Defendant had access in connection with his postal duties to P.O. Box 2426 assigned to MBank USA.

4. Special Agent Joseph L. LaBranche, investigator for MBank USA at Houston, Texas, would testify that:

(a) Thomas Edward Beatty, Jr. (charged with credit card fraud in Case No. SA-86-CR-84), related that the Defendant provided Beatty with the following VISA or Mastercharge Cards issued by MBank USA to the following persons:

1, 2. Richard Blaydes, and
3. Keith L. Little.

(b) Business persons identified the Defendant in possession of the following VISA or Mastercharge Cards issued by MBank USA to the following individuals:

1. Robert L. Chapman, and
2. T. C. Morton.

(c) All the above-listed legitimate and assigned cardholders at various times between June and December 1985 reported that they had moved, had not received their VISA and Mastercharge Cards, and had been billed for charges they did not authorize.

(d) Envelopes on mail from MBank USA addressed to the above-named legitimate and assigned cardholders and enclosing credit cards were marked, "Do Not Forward – Return to Sender," P.O. Box 2426, in San Antonio, Texas 78298.

(e) Unauthorized charges on the above-mentioned credit cards, knowledge of which the legitimate and assigned cardholders disavow, represent actual total dollar losses to MBank USA as follows:

Legitimate Card Customer	Total Loss (Dollars)
1, 2. Richard Blaydes	5,482
	6,056
3. Jack Bradberry	4,908
4. Allen Brown	2,289
5. Romalie Calder	4,045
6. Robert Chapman	1,021
7. Ernest, Elizabeth Cuevas	2,351
8. Hershey Godfrey	10,412
9. Carole, Anthony Harrison	1,809
10. Ronald Kramer	4,074
11. Keith Little	1,409
12, 13. Monte Magruder	471
	1,453
14. L.C. Miller	2,894
15. T. C. Morton	3,793
16. Wil Nefkins	7,488
17. Mike Ribordy	5,236
18. Francis Spaulding	5,053
19. Tommy Watson	9,473
20. Larry Willman	4,049
21. James Windom	6,665
TOTAL:	90,431

The above testimony is offered to satisfy a preponderance of the evidence standard, not one of beyond a reasonable doubt. This is a stipulation as to expected testimony only, not a stipulation of fact. It does not constitute any admission by the Defendant of any fact contained herein.

I agree with the foregoing:

/s/ Lucien B. Campbell — 3-27-87
LUCIEN B. CAMPBELL — Date
Federal Public Defender
Attorney for Defendant

/s/ Frasiel L. Hughey — 3-27-87
FRASIEL L. HUGHEY — Date
Defendant

/s/ Michael R. Hardy — 3-26-87
MICHAEL R. HARDY — Date
Assistant United States
Attorney

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION
(Caption omitted in printing)
(Filed April 18, 1987)

GOVERNMENT'S SUPPLEMENTAL RESPONSE TO DEFENDANT'S OBJECTIONS TQ PROPOSED RESTITUTION ORDER

TO THE HONORABLE JUDGE OF SAID COURT:

The United States, through its undersigned counsel, hereby files this supplemental response to the Defendant's objections to the proposed order of restitution and would show this Court as follows:

I.

Restitution Not Limited to Count of Conviction

The Defendant has steadfastly maintained that this Court lacks jurisdiction to order restitution for criminal transactions extending beyond the confines of the sole count to which he pleaded guilty, Count Four of the Second Superseding Indictment. He urges that his restitutionary responsibility is, therefore, limited to that count's reference to the Defendant's October 18, 1985, unauthorized use of the Hershey Godfrey credit card ($1,055). We disagree.

United States v. Hill, 798 F.2d 402 (10th Cir. 1986), rejected a like argument. *Hill* upheld the district court's authority under the Victim and Witness Protection Act (VWPA) to order restitution ($148,330) which exceeded

losses arising directly out of the offenses charged in the indictment ($20,000). *Id.* at 404, 406. Said the Court: "We hold that in determining the amount of loss to a victim for purposes of awarding *restitution under the VWPA*, a district court *is not limited* either *by* the amount specified in the indictment or *the specific transactions alleged in the indictment*. *Id.* at 406 (emphasis added).

Hill was convicted on two counts of transporting stolen goods in interstate commerce. *Id.* at 403. But, due to evidence adduced at trial, he was held accountable in restitution for theft of the same type of goods from the same victim occurring prior to the criminal transactions charged in the indictment. *Id.* at 406. By the same token, stipulated testimony admitted into evidence at Defendant Hughey's sentencing proceeding establishes restitution responsibility beyond the one MBank-issued credit card he admitted embezzling from the post office, during his rearraignment on Count Four. This evidence shows that Hughey stole the same type of item, twenty other credit cards; in the same manner, embezzlement from the post office; to the detriment of the same victim, MBank USA. Attachment 1. Hughey's restitutionary obligation under the VWPA extends to all of these embezzlements.

Hill distinguishes the language concerning restitution in the VWPA (18 U.S.C. §§ 3579-80) from that in the Federal Probation Act (FPA, 18 U.S.C. § 3651). The FPA permits restitution for aggrieved parties for "loss caused by the *offense for which conviction was had.*" *Id.* at 405 (emphasis in original). Courts have narrowly construed this phrase. *United States v. Missouri Valley Construction Co.*, 741 F.2d 1542, 1547 (8th Cir. 1984) (en banc). On the other hand, the VWPA does not contain such limiting

language; it allows court-ordered restitution "to any victim of the *offense*." *Hill*, 798 F.2d at 405 (emphasis in original). The court noted that "[n]owhere in the VWPA did Congress limit victim compensation to the indictment, even though it must have been aware of such a limitation given the [FPA] by certain courts." *Id.* & n.4.

The VWPA offers the sentencing court a broadened ability to order restitution over that authorized by the FPA. *United States v. Ferrera*, 746 F.2d 908, 909 (1st Cir. 1984); *United States v. Satterfield*, 743 F.2d 827, 833-34 (11th Cir. 1984). Under the FPA, restitution and incarceration may not be imposed on the same count. Under the VWPA, however, restitution may be ordered in tandem with any other authorized penalty as part of a defendant's sentence. *United States v. Hawthorne*, 806 F.2d 493, 495 n.2 (3d Cir. 1986). Moreover, the VWPA specifically provides that '[a]ny dispute as to the proper amount or type of restitution shall be resolved by the court by the *preponderance* of the evidence.' *Hill*, 798 F.2d at 405 (emphasis in original).

Hill also noted the purpose of the VWPA as reflected by its legislative history. Congress intended " 'to restore the victim to his or her prior state of well-being' to the highest degree possible," and to insure that the federal government "does all that is possible within limits of the available resources to assist victims and witnesses of crime without infringing on the constitutional rights of the defendant." *Id.*

Hill's observations on the policies underlying the VWPA are particularly illuminating:

> [W]e believe limiting a victim's recovery to the amount charged in the indictment or to particular counts of the offense is unwarranted given the compensatory objectives of the VWPA. The decision of a prosecutor to indict a defendant and the manner in which a defendant is indicted have little, if any, to do with objectives of the VWPA. For instance, a prosecutor's decision to charge a defendant for one or more counts of an offense is discretionary, and that discretion is exercised taking into consideration law enforcement objectives which have nothing to do with the congressional objective of compensating crime victims. The decision to specify an amount in the indictment is also often solely for the purpose of satisfying jurisdictional requirements.

Id.

Authorities cited by the defense, *United States v. Barnette*, 800 F.2d 1558, 1571 (11th Cir. 1986) (per curiam), and *United States v. Durham*, 755 F.2d 511 (6th Cir. 1985), do not persuade. They matter-of-factly lump restitution orders under the VWPA with their more restrictive counterparts under the FPA. Unlike *Hill*, they fail to consider meaningful distinctions between the two. *Barnette* reaches its conclusion concerning the VWPA by referring without explanation to one FPA case. 800 F.2d at 1571. *Durham* offers a conclusion without citation of authority or analysis. 755 F.2d at 512.

Hill's restitution rationale is applicable not only in cases where proof of loss is presented at a trial. It likewise applies to pleas of guilty on one on [sic] more counts of a multicount indictment when the remaining counts are dismissed. *United States v. Mischler*, 787 F.2d. 240, 245 (7th Cir. 1986).

Even under the more restrictive FPA, several appellate courts have not strictly limited restitution orders to the count or counts of conviction. Each count in a multi-count fraud or conspiracy case has been regarded as one act in furtherance of a unitary scheme, so that restitution may be ordered for losses caused by the entire scheme or conspiracy. *Id.* at 245 (ongoing scheme to defraud); *United States v. Sleight*, 808 F.2d 1012, 1018-19 (3d Cir. 1987); *Hawthorne*, 806 F.2d at 496-97; *United States v. Martin*, 788 F.2d 184, 188 (3d Cir. 1986); *United States v. Woods*, 757 F.2d 82, 88 (3d Cir. 1985); *United States v. Pivirotto*, 775 F.2d 82, 87-88 (3d Cir. 1985); *United States v. Harris*, 761 F.2d 394, 404 (7th Cir. 1985); *United States v. McMichael*, 699 F.2d 193, 195 (4th Cir. 1983); *United States v. Tzakis*, 736 F.2d 867, 871 (2d Cir. 1984).

Hill, it must be remembered, allowed restitution under the VWPA beyond the confines of the indictment, which charged neither a conspiracy nor a scheme. Nevertheless, a fraudulent scheme was adequately alleged and shown in the instant case. The plea agreement letter of October 20, 1986, submitted by defense counsel recognizes that the Second Superseding Indictment alleged the Defendant's involvement in a singular scheme ("the scheme alleged in the Indictment"). Attachment 2. The six-count Second Superseding Indictment facing the Defendant referred to the Defendant's embezzlement of credit cards from the mail (Counts 1-2, 5-6). It also mentioned the Defendant's unauthorized use of credit cards with intent to defraud (Counts 2, 4, 6). Attachment 3. Thus, as the Defendant recognized, the indictment charged him with a scheme involving the embezzlement and unauthorized use of credit cards.

The indictment counts contain "on or about" allegations. Also, Count Four, to which the Defendant pleaded guilty, refers to the Defendant's obtaining "more than $1,000" as a result of this fraudulent conduct. Consequently, the indictment's language did not convey that restitutionary obligations would be limited to a criminal transaction occuring on a particular date, or that the victim's loss was limited to a particular dollar amount.

The Defendant has been given further notice of the government's intention to hold him responsible for losses attributable to his embezzlement of numerous MBank credit cards from the mail, credit cards in addition to those mentioned in the indictment. The government's proffered factual basis for the Defendant's guilty plea at rearraignment alluded to the Defendant's embezzlement of over 15 credit cards.

More important, the evidence offered in support of the restitution order in connection with this sentencing proceeding establishes by a preponderance of the evidence the Defendant's involvement in a scheme to defraud MBank USA. The evidence shows that the Defendant embezzled at least 21 separate MBank-issued credit cards by betraying his position of trust with the post office where he worked. The government's proof further shows that the Defendant's fraudulent scheme resulted in a loss to MBank of at least $90,431. Whether under the logic of *Hill* and the VWPA or the reasoning of the FPA scheme cases, the Defendant may be held accountable in restitution for all the losses the Defendant caused MBank USA as a result of his credit card embezzlements.

II.

Restitution Unaffected by Possible Intervening Acts of Others

Defendant Hughey has suggested that he should not be held accountable for unauthorized charges billed by others after he stole the credit cards. The government need not prove that Hughey was *directly* responsible for all the losses claimed. Because Hughey's embezzlement created the circumstances under which MBank's harm occurred, he bears restitutionary responsibility for subsequent acts caused by others with regard to the credit cards he stole or unlawfully possessed. *See United States v. Spinney*, 795 F.2d 1410, 1417 (9th Cir. 1986) (citing cases). Stipulated testimony shows that Hughey embezzled from the post office where he worked 21 MBank-issued credit card (sic).

III.

Current Indigency No Bar to Restitution Order

Every federal court considering the issue has ruled that indigency at the time of sentencing, though a factor to be considered, does not bar restitution under the VWPA or FPA. *United States v. Mounts*, 793 F.2d 125, 128 (6th Cir. 1986) (citing cases); *United States v. Roberts*, 783 F.2d 767, 771 (9th Cir. 1985) (bankrupt defendant).

United States v. Atkinson, 788 F.2d 900, 904 (2d Cir. 1986), upheld the district court's power to assess sizeable restitution demands on an indigent. The court made the following observations, which apply with equal force here:

> District judges are not seers and cannot accurately predict a defendant's economic future . . . .In fact, "[r]ecognizing that indigency may be temporary, Congress provided for payment of restitution during a period of up to five years after the completion of any prison sentence imposed.". . . .
>
> Since many defendants who are sentenced to terms of incarcertaion (sic) do not have the funds to make restitution immediately, restitution orders would be severely limited if district judges did not have discretion to discount the importance of present indigency in performing the statutory balance. Although there may be little chance that it will ever be made, if full restitution is not ordered at the time of sentencing, an indigent would evade the statutory purpose of making the victim whole in the event he should subsequently come into sufficient funds.

Id.

Holding Defendant Hughey responsible for the sizeable losses attributable to his criminal conduct furthers the VWPA's objectives. Restitution should restore the victim as far as possible to the position he would have enjoyed if the defendant's criminal acts had never occurred. *Kelly v. Robinson*, ___ U.S. ___, 107 S.Ct. 353, 360-61 n.10, 93 L.Ed.2d 216 (1986). Rather than an afterthought, restitution should inevitably insure that the wrongdoer makes good, to the degree possible, the harm he caused the victim. *Atkinson*, 788 F.2d at 903.

The government's evidence shows that the Defendant caused MBank losses in excess of $90,000. He may still possess ill-gotten gains. A substantial restitution order places the financial burder (sic) where it belongs, on the malefactor – not on the victim or society. It may

also encourage a return of fraudulently obtained property.

Furthermore, this Court has already imposed a properly substantial restitution order on related defendant Clarence Thompson. Thompson was less culpable than Hughey, who supplied the stolen credit cards. So that the punishment will fit the crime and the offender, a similarly hefty restitutionary obligation should be imposed on Defendant Hughey. *See United States v. Anglian*, 784 F.2d 765, 768 (6th Cir. 1986). The Defendant should be put to his best efforts to make his victim whole.

IV.

Restitution Amount Established

By offering the Court stipulated testimony, the government has established a compromised restitution figure of $90,431 to protect against undue complication or prolongation of the sentencing process. Aside from the Defendant's rearraignment, of which this Court may take judicial notice, no other evidence was offered. The government's figure is, therefore, satisfied by a preponderance of the evidence. MBank has represented that the $90,431 is not affected by cardholder deductibles, and the victim is not expected to receive insurance compensation covering any part of the loss. By relying on the figure set forth in the stipulation, this Court will reach an expeditious, reasonable determination and would resolve uncertainties with a view toward achieving fairness to the victim. *United States v. Richard*, 738 F.2d 1120, 1123 (10th Cir. 1984).

In view of the foregoing, the Defendant should be ordered to pay restitution to MBank USA in the amount of $90,431, an obligation he should share jointly and severally with related defendants.

Respectfully submitted,

HELEN MILBURN EVERSBERG
United States Attorney

By: /s/ Michael R. Hardy
MICHAEL R. HARDY
Assistant United
State Attorney

[Certificate of Service omitted in printing.] [Attachment 1 (Government's Exhibit 1, "Stipulation"); Attachment 2 (plea agreement letter filed October 22, 1986); and Attachment 3 (Second Superseding Indictment) are omitted in printing as they are already included in this Joint Appendix.]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION
(Caption omitted in printing)

DEFENDANT'S REPLY TO GOVERNMENT'S SUPPLEMENTAL RESPONSE TO DEFENDANT'S OBJECTIONS TO PROPOSED RESTITUTION ORDER

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Defendant Frasiel L. Hughey, by and through his undersigned attorney and files this Defendant's Reply to Government's Supplemental Response to Defendant's Objections to Proposed Restitution Order and would show the Court as follows:

I

The Government Mischaracterizes the Defendant's Position

In paragraph I of its Supplemental Response, the government asserts the Defendant's position to be that restitution may not exceed the $1055 amount of the October 18, 1985 transaction of which the Defendant stands convicted. The government attempts to set up this false position only to knock it over, thereby to argue for restitution in the highest amount of $90,431. At the hearing on the matter of restitution, however, defense counsel *suggested* a restitution order beyond the transaction of conviction, totaling $10,412, the sum of all unauthorized uses of the Hershey Godfrey credit card which was named in the count of conviction. For Defendant's view to prevail, the Court need not hold that restitution may never exceed

the count of conviction – there is ample authority that under proper circumstances, it may. The Court, however, is obliged to examine the facts and circumstances to determine just how far beyond the count of conviction, if at all, restitution may extend in a particular case.

The Defendant's authorities make it clear that the Court may order restitution to any victim of the offense of conviction. The offense of which the Defendant was convicted was credit card fraud with a certain credit card issued to one Hershey Godfrey. Restitution is accordingly limited to that offense. *United States v. Barnette*, 800 F.2d 1558, 1571 (11th Cir. 1986) ("The amount of restitution under 18 U.S.C. § 3579(b)(1) (1982) or 18 U.S.C. § 3651 (1982 & Supp. III 1986) may not exceed the actual losses flowing from the offense for which the defendant has been convicted.") To the same effect is *United States v. Durham*, 755 F.2d 511, 512 (6th Cir. 1985) ("A natural construction of this language [§ 3579(a)(1)] would require that the defendant make restitution only to victims of the offense for which he was convicted.")

The government relies upon *United States v. Hill*, 798 F.2d 402 (10th Cir. 1986). Defendant submits the proposed restitution of $10,412 is consistent with that authority. In Hill, the defendant was convicted of two counts of interstate transportation of "Ralgro" steroid implant stolen from the Crown warehouse. The court ordered restitution which included other uncharged thefts by the defendant of the same "Ralgro" from the same complainant, Crown. Restitution was thus ordered to extend to takings which were more of the same, compared to the counts of conviction. Analogizing to the case at bar, *Hill* would support a restitution order encompassing all of the takings which

were the same as alleged in the count of conviction, namely, use of the Hershey Godfrey credit card. It is an unwarranted extension of *Hill* to say it supports restitution for unauthorized use of *other* credit cards, as other times and places, including other federal judicial districts. Defendant's authorities, *Barnette* and *Durham*, would not permit such an extension.

II

Offense of Conviction Did Not Include a Scheme

During the hearing on restitution, defendant's counsel observed that a common circumstance supporting restitution beyond the offense of conviction is where the offense includes as an element a scheme which encompasses other takings. Examples given were mail fraud, which requires the existence of a scheme to defraud, or a conspiracy which was alleged to include a scheme to defraud. Government counsel now seeks to argue there was a scheme in this case which supports restitution in the amount of $90,431.

The reference to a scheme in the plea agreement letter can hardly be said to have amended the indictment, or enlarged the offense of conviction. The purpose of the plea letter was to establish all the things the Defendant would *not* be convicted of. Finally, even if one might infer the existence of a scheme from the allegations of the indictment taken as a whole, Defendant was not convicted of the indictment as a whole. Defendant was convicted of one count of unauthorized credit card use, 18 U.S.C. § 1029(c), which does not require any scheme, and no scheme was alleged. Restitution under the Victim and

Witness Protection Act is based upon the offense of conviction, not the imagination of the prosecutor. The government's arguments that Defendant had notice the government would seek greater restitution do not provide a legal basis for ordering that restitution. Defendant properly and timely followed the prescribed procedures of this Court for objecting to the proposed order of restitution.

III

The Level of Proof

Assuming *arguendo* that restitution for other credit cards may be ordered, which Defendant does not concede, the government's proof is inadequate to support the total sought, $90,431. In paragraph II of its Supplemental Response, the government asserts the evidence shows the Defendant embezzled all 21 credit cards making up the $90,431 loss. According to the compound hearsay of the stipulated testimony, however, the government's evidence that Defendant embezzled credit cards from the post office went only to the 15 cards named by Clarence Thompson. Stipulation, pp 1-2. Beatty said the Defendant provided him with 3 other credit cards. *Id.*, p. 3. As to the remaining credit cards, the government's showing did not establish an argument for overall responsibility for the entire amount. In paragraph 2 of the stipulation, a hearsay showing is made that "a business person" identified the Defendant as a person who had used a James R. Windom credit card. This is not sufficient to support an order of restitution for all unauthorized uses of that credit card. Paragraph 4(b) of the stipulation presents

hearsay from unnamed business persons that the Defendant was *"in possession of"* two certain credit cards. There was no showing of the Defendant's responsibility for unauthorized use of those credit cards. This too is insufficient. It must be remembered that the government bears the burden of establishing the losses attributable to the Defendant, by a preponderance of the evidence. 18 U.S.C. § 3580(d).

IV

The Defendant's Financial Resources and Earning Ability

Title 18, U.S.C. § 3580(a) states (emphasis added):

> The court, in determining whether to order restitution under section 3579 of this title and the amount of such restitution, *shall consider* the amount of the loss sustained by any victim as a result of the offense, *the financial resources of the defendant, the financial needs and earning ability of the defendant* and the defendant's dependents, and such other factors as the court deems appropriate.

It is thus mandatory for the Court to consider the Defendant's financial resources and earning ability. Defendant accepts the statement of his earnings history and financial condition in the presentence report, and asks the court to consider it in determining restitution. During the hearing, government counsel argued the Court should impose $90,431 restitution because, *e.g.*, the Defendant might win the lottery. This is contrary to Congressional intent. The statute does not say to disregard the defendant's financial resources because he may strike it rich someday, it says the Court *"shall consider"* the

financial resources and earning ability. A proper consideration of those factors suggests that restitution in the amount proposed by Defendant's counsel, $10,412, is proper.

In its written submission, the government relies heavily upon *United States v. Atkinson*, 788 F.2d 900 (2d Cir. 1986). In *Atkinson*, the trial judge ordered restitution of the fullest amount of $29,813.76 for conviction of three bank robberies. (All of which was based upon the counts of conviction, it should be noted.) The result in *Atkinson* was that the case was remanded to the district judge with instructions to weigh the § 3580(a) factors in deciding restitution because the judge had eschewed consideration of a compromise figure of $10,000 or $15,000. The teaching of *Atkinson* is that it is not proper to leave the weighing of ability to pay to parole officials at a later date, as the government urges. The Defendant is entitled to have those factors properly weighed not only later, if constitutionally required, but now, as statutorily required. *Atkinson* rejects the suggestion that the balancing may be deferred until the time of enforcement.

Other language in *Atkinson* is highly instructive: "[C]ongress did not intend that restitution would compensate the victim's loss in every case", 788 F.2d at 903; "Under this scheme it would unquestionably be proper at sentencing for a district judge, in considering a defendant's present and likely future situations, to order restitution of a lesser amount than that which the victim actually lost"; *Id.*; "A district judge must consider all the factors listed in section 3580(a) at the time of sentencing, and may in his discretion reach a compromise figure based on that consideration." *Id.* at 904.

The government also argues that the Court should impose $90,431 restitution on Defendant because the Court has already imposed a "properly substantial" restitution order on related defendant Clarence Thompson. The government neglects to mention the amount, $147,646.89, which now appears excessive. It is a commonplace that two wrongs (or even three wrongs[1]) do not make a right. This Court will seek to do justice in this case, not withstanding the fact that an injustice may have been done in a related case.[2]

Conclusion

The government seeks a restitution order in an amount, $90,431, which is beyond both the statutory authority for restitution and the Defendant's ability to pay. Defendant's counsel proposes a compromise order of $10,412 which has a sound legal basis and which, happily, appears to be proper considering Defendant's financial resources and earning prospects. The Court is required to consider these factors, and may not defer that process for the time of enforcement on the theory the Defendant may win the lottery[3] in the meantime. Counsel respectfully

---

[1] A third related defendant, Thomas Beatty, will likely be before this Court for consideration of a restitution order.)

[2] In any event, this Court retains authority through April 2, 1987 to reduce the amount of restitution in the Clarence Thompson case, SA-86-CR-163, by means of an order under Rule 35, F.R.Crim.P. *See United States v. Atkinson*, 788 F.2d at 901; *United States v. House*, 808 F.2d 508, 509 (7th Cir. 1986).

[3] First, Texas does not have a lottery. Second, even if the legislature should create one, the Defendant would be better

(Continued on following page)

urges the Court to enter the compromise restitution order of $10,412 which is both realistic and just under all circumstances.

Respectfully submitted,

/s/ Lucien B. Campbell
LUCIEN B. CAMPBELL

ATTORNEY FOR
DEFENDANT

[Certificate of Service omitted in printing]

(Continued from previous page)

advised to pay on his debts than to play it. Third, it has been observed that one has a statistically better chance of being struck by lightning than of winning a lottery.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION
(Caption omitted in printing)
(Transcript of Proceedings of April 2, 1987) (p. 20)

THE COURT:

* * *

And, based on a preponderance of the evidence, the Court orders that in accordance with the Victim and Witness Protection Act of 1982 and its amendments to Title 18, United States Code, Section 3579, the Defendant will make restitution to MBank USA in the amount of $90,431. The restitution must be paid in full within five years after the end of the term of imprisonment.

* * *

United States District Court for
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION
DOCKET NO. SA-86-CR-162

FRASIEL LIONEL HUGHEY
325 Bethune
San Antonio, Texas, 78208

JUDGMENT AND
PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date (month) April (day) 2, (year) 1987

[X] **WITH COUNSEL** Mr. Lucien B. Campbell

[X] **GUILTY**, and the court being satisfied that there is a factual basis for the plea, at re-arraignment on 10-27-86;

There being a finding/verdict of [ ] **NOT GUILTY.** Defendant is discharged

[ ] **GUILTY.**

Defendant has been convicted as charged of the offense(s) of credit card fraud on or about October 18, 1985, in violation of Title 18, United States Code, Section 1029(a)(2), as charged in count four of the second superseding indictment filed September 17, 1986.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General

or his authorized representative for imprisonment for a period of eight (8) years pursuant to Title 18, United States Code, Section 4205(a).

Based on a preponderance of the evidence, the Court **ORDERS** that in accordance with the Victim and Witness Protection Act of 1982 and its amendments to Title 18, United States Code, Section 3579, the defendant make restitution to MBank USA in the amount of $90,431.00 to be paid within five (5) years after the end of the term of imprisonment. The restitution ordered herein is assessed jointly and severally with all other defendants related in this offense.

It is **FURTHER ORDERED** that the defendant shall immediately pay to the Attorney General a penalty assessment in the amount of $50.00 for the purpose of funding a federal crime victims fund, pursuant to the "Victims of Crime Act of 1984", 18 U.S.C., Section 3013.

In addition to the special conditions of probation imposed above it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation reduce or extend the period of probation and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

On motion of the U. S. Attorney, pursuant to the plea agreement, the remaining counts of the superseding indictment filed 9/17/86, the superseding indictment filed 8/6/86, and the original indictment filed 7/2/86 is hereby dismissed as to this defendant.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

/s/ HF Garcia
H. F. GARCIA
U.S. District Judge

Date April 6, 1987

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION
(Caption omitted in printing)

MOTION TO REDUCE SENTENCE AND TO CORRECT ILLEGAL SENTENCE

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Defendant Frasiel L. Hughey, by and through his undersigned attorney and files this Motion to Reduce Sentence and to Correct Illegal Sentence and would show this Honorable Court as follows.

I

Motion to Reduce Sentence

On April 2, 1987, this Court sentenced Defendant on one count of credit card fraud to eight years' imprisonment under 18 U.S.C. § 4205(a), a mandatory special assessment of $50, and restitution of $90,431 (assessed jointly and severally with related defendants). As a renewed plea for leniency, for reasons set out in the accompanying memorandum, Defendant respectfully requests the Court to reduce the sentence previously imposed. Federal sentencing alternatives afford a number of ways in which the sentence may be reduced, while still providing appropriate punishment. Imposition of a split sentence under 18 U.S.C. § 3651 would permit the Defendant to commence working to pay restitution sooner, and a probationary condition of community service could be imposed as well. Early parole eligibility under 18 U.S.C. § 4205(b)(2) or (1) could possibly be of benefit to the

Defendant, since his present sentence requires him to serve a minimum of thirty-two months. Further, the Court may reduce the amount of restitution as a matter of discretion, in consideration of Defendant's lack of financial resources and earning ability.

II

Motion to Correct Illegal Sentence as to Restitution

The restitution amount of $90,431 included losses attributed to a number of credit cards, not limited to the credit card named in the count of conviction. The statute of conviction, credit card fraud under 18 U.S.C. § 1029(a)(2), does not include a scheme or conspiracy encompassing all the credit cards for which restitution was ordered. Since restitution under the Victim and Witness Protection Act is limited to any victim of the offense of conviction, as opposed to victims of offenses not resulting in conviction, the restitution order is excessive and must be reduced.

WHEREFORE, premises considered, Defendant prays this Honorable Court will discretionarily reduce the sentence in this case, and also reduce the restitution order to an amount in keeping with applicable law.

Respectfully submitted,

/s/ Lucien B. Campbell
LUCIEN B. CAMPBELL

ATTORNEY FOR
DEFENDANT

[Certificate of Service omitted in printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO TEXAS
(Caption omitted in printing)
(Filed Oct. 7, 1987)
ORDER

On this day came on to be considered the motion of defendant Hughey to reduce sentence and to correct an illegal sentence, and the government's response thereto. Having considered the motion for reduction of sentence, and the responses of the United States Attorney and the United States Probation Office thereto, the Court is of the opinion the motion should be denied. The remainder of this order shall be directed to the propriety of the judgment ordering restitution in the amount of $90,431.00. This issue was briefed by the parties both prior to and after sentencing. Since defendant was not granted probation, 18 U.S.C. Section 3651 does not apply. Authority for the restitution must be found in the Victim and Witness Protection Act, 18 U.S.C. Sections 3579 and 3580.

Section 3579(a)(1) provides that the Court, when sentencing a defendant, may order, in addition to or in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense. Defendant has contended that restitution must be limited to the offense of which the defendant is convicted. Defendant pled guilty to count 4 of a 5 count superseding indictment charging him with theft of mail by a postal employee and with credit card fraud. Defendant admitted that he knowingly, and with intent to defraud, used an unauthorized access device, to-wit: MBank Mastercard

credit card issued to Hershey Godfrey. Hughey contends that he can only be responsible for the $10,412 of losses attributable to the use of that credit card, since that is the only offense of which he was convicted. *See, United States v. Barnette*, 800 F.2d 1558, 1571 (11th Cir. 1986). *United States v. Durham*, 755 F.2d 511, 512 (6th Cir. 1985). However, the majority of courts have found, and this Court agrees, that a district judge has the authority to assess restitution in excess of the amount indicated by the count to which the guilty plea was entered. *United States v. Mischler*, 787 F.2d 240, 245 (7th Cir. 1986). *United States v. Anglian*, 784 F.2d 765 (6th Cir. 1986). Given the compensatory objectives of the VWPA, limiting a victim's recovery to the amount charged in the indictment or to a particular count is unwarranted. *United States v. Hill*, 798 F.2d 402, 405 (10th Cir. 1986). *United States v. Kail*, 804 F.2d 441, 449 (8th Cir. 1986).

As regards the restitution issue, the defendant and the United States agreed to the admissibility of testimony that would have been offered by witnesses for the government. That stipulation showed that defendant Hughey gave Clarence Thompson 15 separate credit cards. This stipulation also showed that defendant either used, provided, or was in possession of 6 other credit cards. The total loss in dollars caused to the issuing banks was $90,431. Although defendant Hughey did not himself benefit in that sum, the loss to the issuing banks in that amount was caused by the fact that he used the credit cards or caused them to be used. The Court finds that a preponderance of the evidence supports the award of restitution.

Some courts have justified an award of restitution in excess of the particular counts of the indictment of which the defendant was convicted, by reference to a fraudulent scheme of which the counts of conviction were only part. *See, United States v. Martin*, 788 F.2d 184 (3rd Cir. 1986). *United States v. Paul*, 783 F.2d 84, 88 (7th Cir. 1986). *United States v. Woods*, 775 F.2d 82 (3rd Cir. 1985). Even if the existence of a scheme is a prerequisite to restitution beyond the counts of conviction, the Court finds that this requirement has been satisfied in this case. As a postal employee defendant Hughey developed a scheme by which he stole credit cards which had been returned to the post office undelivered. He stole at least 21 credit cards and either used them himself or caused them to be used to the detriment of the issuing banks. Even the plea agreement signed by defendant's counsel refers to the "scheme alleged in the indictment". The credit card fraud scheme perpetrated by defendant justifies an award of restitution in excess of the amount in the count to which he pled guilty.

Hughey further contends that an award of restitution against him is precluded by the prior award against defendant Clarence Thompson. Section 3579(e)(1) precludes the imposition of restitution with respect to the loss for which the victim has received or is to receive compensation. Though a double recovery by the victim is precluded, awards of joint and several liability are not. The fact that defendant Thompson was ordered to make restitution in the full amount does not assure that the victims' losses will be reimbursed. Until they are, defendant Hughey can be held liable for the losses he has caused.

Hughey finally argues that his indigency should preclude the restitution order. Section 3580 requires that the Court consider the financial resources of the defendant, the financial needs and earning ability of the defendant, and the defendant's dependents in determining whether to order restitution and the amount of such restitution. Though these factors must be considered, the VWPA does not prohibit the imposition of restitution upon a defendant who is indigent at the time of sentencing. *United States v. Mounts*, 793 F.2d 125, 128 (6th Cir. 1986). *United States v. Ruffen*, 780 F.2d 1493, 1495 (9th Cir. 1986). Having considered the evidence of defendant's financial status, the Court remains convinced that the restitution award of $90,431 is appropriate.

It is, therefore, ORDERED that defendant's motion to reduce sentence and to correct an illegal sentence be, and it hereby is, DENIED.

SIGNED this 7th day of October, 1987.

/s/ H.F. Garcia
H.F. GARCIA
UNITED STATES
DISTRICT JUDGE

United States Court of Appeals,
Fifth Circuit.

July 27, 1989.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Frasiel L. HUGHEY,
Defendant-Appellant.

No. 87-5596.

Appeal from the United States District Court for the Western District of Texas.

Before REAVLEY, WILLIAMS and JONES, Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge:

Frasiel L. Hughey pleaded guilty to one count of illegal credit card use out of a six count indictment, pursuant to a plea bargain. Hughey now appeals the denial of his Fed.R.Crim.P. 35 motion to correct his sentence on the ground that it was error for the trial court to order him to pay restitution beyond that attributable to the one criminal act of which he pleaded guilty. He claims the amount of restitution assessed exceeds that authorized by the Victim and Witness Protection Act (the "VWPA") for four reasons: 1) It includes the value of losses caused by crimes of which he was not found guilty. 2) While it is true that a defendant need not be convicted of a particular offense for that offense to figure into restitution calculations in scheme or conspiracy convictions, Hughey was convicted of neither. 3) The wrong

standard of proof was applied by the court. 4) The court did not sufficiently consider his indigency in its restitutive assessment. We affirm the trial court's assessment of restitution.

Facts and Prior Proceedings

Hughey was charged in a second superseding indictment with three counts of mail theft (18 U.S.C. § 1709) and three counts of fraudulent use of a credit card (18 U.S.C. § 1029(a)(2)). He pleaded guilty to count IV of the indictment, which alleged that on or about October 18, 1985, he misused a Mastercard issued by MBank to Hershey Godfrey by buying merchandise worth more than $1000.00 with it.

As part of the plea bargain, detailed in a letter to the court by Hughey's attorney, the government agreed to dismiss all the remaining counts of all three indictments and not to prosecute Hughey for "any other offense arising in the Western District of Texas as part of the scheme alleged in the indictment." The plea bargain was silent regarding restitution. The government offered as the factual basis for the guilty plea that Hughey was a postal employee, that one of his tasks was to place undelivered MBank credit cards in a specific San Antonio Post Office box, and that he had stolen the undelivered Godfrey credit card "as well as a number of other cards adding to more than 15 in number." Hughey specifically advised the court that he was not acknowledging or responding to any allegations other than count IV (misuse of the Godfrey credit card).

When taking the guilty plea, the court notified Hughey that it could impose restitutive obligations in addition to other penalties. After the plea but before sentencing, Hughey was notified by the United States Probation Office that restitution of $147,646.89 might be sought at the time of sentencing. Hughey objected to this figure, and the government submitted a revised figure of $90,431, which was derived by adding up the losses resulting from unauthorized use of 21 credit cards issued by MBank to 19 individuals, including the Godfrey card.

In a hearing prior to sentencing, the government offered a stipulation of the testimony of witnesses that the government could produce who would testify with regard to Hughey's responsibility for the misuse of the 21 credit cards.[1] The defense made no objection but noted

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[1] As this stipulation formed the basis for the restitutive order (and the current appeal), it is useful to detail what facts the government planned to offer. The stipulations consisted of the following:

1) A Secret Service agent would testify that Clarence Thompson told him that Hughey gave Thompson 15 Visa or Mastercharge cards issued by MBank, and admitted to getting these cards from the post office where he worked.

2) A Postal Inspector would testify that "a business person" identified Hughey as having used an MBank Mastercharge card issued to James Windom.

3) Hughey's Postal Supervisor would testify that Hughey had access to the MBank post office box.

4) An investigator for MBank would testify that:

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that this was a stipulation as to expected testimony, not fact.

In response to the government's proposed figure, Hughey offered to make restitution of $10,412, which he claimed was the sum representing the total loss caused by the unauthorized use of the Godfrey credit card. He argued that he could not be legally held responsible for any greater restitution under the VWPA.

On April 2, 1987, Hughey was sentenced to eight years for violation of 18 U.S.C. § 1029(a)(credit card fraud). Pursuant to the VWPA, 18 U.S.C. §§ 3579 and 3580 (1982) and Supp. IV 1986) (current versions at 18 U.S.C.

(Continued from previous page)

a) Thomas Beatty said Hughey provided him with a total of 3 MBank charge cards.

b) "Business persons identified the defendant in possession" of 2 additional MBank charge cards.

c) All of the listed charge card holders, totaling 19, reported charges they had not made on their cards (totalling 21 – two of the card-holders each has two cards misappropriated), which they had not received in the mail.

d) The cards had all been addressed to people who had moved. The envelopes which held the cards were marked, "Do not forward – Return to sender, P. O. Box 2426, San Antonio, TX. 78298" (the P.O. Box Hughey has access to.)

e) The total losses on the 21 cards from unauthorized charges was $90,431.

§§ 3663 and 3664),[2] he was ordered to make restitution to MBank of $90,431.

Hughey appeals the trial court's denial of his "Motion to Reduce Sentence and to Correct an Illegal Sentence" made under Fed.R.Crim.P. 35. In that motion he challenged the trial court's assessment of restitution as illegal under the VWPA. The trial court stated, when denying Hughey's motion in its order of October 7, 1987:

> The total loss in dollars caused to the issuing banks was $90,431. Although defendant Hughey did not himself benefit in that sum, the loss to the issuing banks in that amount was caused by the fact that he used the credit cards or caused them to be used. The Court finds that a preponderance of the evidence supports the award of restitution.

The court also stated that while it had considered Hughey's indigency, it was convinced that the award was appropriate.

I. Restitution for Acts for Which the Defendant Was Not Convicted.

A. *Standard of Review*

In reviewing the denial of a rule 35 motion, this Court will "examine only whether the sentence was

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[2] 18 U.S.C. § 3579 and § 3580 have since been recodified at 18 U.S.C. §§ 3663 and 3664, respectively. However, the application of the statute as in force at the time of Hughey's sentencing is what is challenged. It is that version of the statute which we must apply. Hence, for the sake of clarity, we will refer throughout this opinion to §§ 3579 and 3580.

illegal or whether the district court abused its discretion." *U.S. v. Kirkland*, 853 F.2d 1243, 1246 (5th Cir. 1988). The legality of a criminal sentence is examined on a *de novo* basis. *See U.S. v. Pomazi*, 851 F.2d 244, 247 (9th Cir. 1988). Because Hughey challenges the legality of his criminal sentence, we review *de novo*.

May a defendant, charged with multiple offenses, who pleads guilty to one offense be required to make restitution under the VWPA for acts of which he was not found guilty? This is the critical issue before us. We find statutory language, history, and case authority all support a trial court's authority to assess restitution under the VWPA in appropriate circumstances for losses beyond those attributable to the offense of conviction.

B. *Statutory Language and History*

Section 3579 of the VWPA refers to "a defendant convicted of an offense" and "any victim of such offense."[3] Section 3580 refers to "the amount of the loss

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[3] The applicable sections of the VWPA were codified at 18 U.S.C. §§ 3579 and 3580. They were then amended twice, so that the relevant portions of § 3579 in force on April 2, 1987 (date of Hughey's sentencing) read as follows:

> § 3579. *Order of restitution*
>
> (a)(1) The court, when sentencing a defendant convicted of an offense under this title . . . may order, in addition to or in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense. . . .

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sustained by any victim as a result of the offense."[4] The difficulty here is that the term "offense" is not defined independently. Hence the statute is ambiguous, and we must give the term meaning.

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(b) The order may require that such defendant –

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense –

(A) return the property to the owner of the property or someone designated by the owner; or

(b) if return of the property under subparagraph (a) is impossible, impractical, or inadequate, pay an amount equal to the greater of –

(i) the value of the property on the date of the damage, loss, or destruction, or

(ii) the value of the property on the date of sentencing, less the value (as of the property is returned) of any part of the property that is returned;. . . .

18 U.S.C. § 3579 (1982 and Supp. IV 1986) Pub.L. 99-646, § 79(a) 1986), amended Subsection (a)(1), changing "the offense" to "such offense."

See 18 U.S.C. §§ 3579 (Supp. IV 1986).

[4] § 3580. *Procedure for issuing order of restitution:*

(a). The court, in determining whether to order restitution under section 3579 of this title and the amount of such restitution, shall consider the amount of the loss sustained by any victim as a result of the offense, the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate.

The reference in § 3579 to "such offense" and the repeated references to "the" property by themselves admittedly point to a maximum restitution determined by the loss attributable only to the offense of conviction and "perhaps for the proposition that the charging instrument establishes the maximum amount of that loss." *United States v. Berrios*, 869 F.2d 25, 28 (2nd Cir. 1989).

Two procedural provisions of the VWPA, however, suggest a more open-ended application of the term "offense" was intended. Section 3580 provides that "the court, in determining . . . the amount of such restitution, shall consider the amount of the loss sustained by any victim as a result of the offense," and that it shall consider "such other factors as the court deems appropriate." 18 U.S.C. § 3580(a). It is obvious that the amount of loss may be more than that stated in the charging instrument. Therefore, at the minimum, the VWPA dose not limit restitution to the amount specified in an indictment. Furthermore, the amount of loss is put forward as only one factor that the court must consider. The statute obviously gives a sentencing court some discretion in determining the proper restitutive amount. *See Berrios*, 869 F.2d at 29.

Section 3580(e) provides for estoppel in subsequent civil proceedings:

> A conviction of a defendant for an offense involving the act giving rise to restitution under this section shall estop the defendant from denying the essential allegations of that offense in any subsequent Federal civil proceeding or State civil proceeding, to the extent consistent with State law, brought by the victim.

18 U.S.C. § 3580(e) (1982). If Congress had intended to limit the amount of restitution to that attributable to the offense of conviction, subsection (e) would not have needed to employ the phrase "for an offense involving the act giving rise to restitution" but instead could have simply stated "for an offense giving rise to restitution." The phrase "involving the act" would be useless surplusage if such a limited reading was intended. It is our duty to give effect to every clause and word of a statute, if possible. *See United States v. Menasche*, 348 U.S. 528, 538-39, 75 S.CT. 513, 520, 99 L.Ed. 615 (1955) (*quoting Montclair v. Ramsdell*, 107 U.S. 147, 152, 2 S.Ct. 391, 395, 27 L.Ed. 431 (1883)). Inclusion of the phrase "involving the act" "implies that the acts for which restitution may be ordered must be related to the offense of which defendant is convicted, but that those acts may extend beyond the boundaries of the offense itself." *Berrios*, 869 F.2d at 29.

An analysis of the history of the VWPA further confirms a broader reading of the term "the offense." If "offense" was meant to be limited purely to the offense for which defendant is convicted, the VWPA could have been written as was the Federal Probation Act (FPA). The FPA provided that a defendant "[m]ay be required to make restitution . . . to aggrieved parties for . . . loss caused by the *offense for which conviction* was had." 18 U.S.C. § 3651 (1982) (repealed effective November 1, 1986, pursuant to § 235 of Pub.L. 98-473) (emphasis added). The VWPA contains no such limiting language. *United States v. Hill*, 798 F.2d 402, 405 (10th Cir. 1986); *see also Berrios*, 869 F.2d at 28-29.

Even under the more restrictive language of the FPA there was a division among the Circuit Courts on whether restitution was in fact limited to the amount charged in the indictment. *Compare United States v. McMichael*, 699 F.2d 193, 195 (4th Cir. 1983) (allowing restitution outside of amount alleged in indictment, as long as it was an actual damage directly caused by illegal activity with which defendant was charged) *with United States v. Black*, 767 F.2d 1334, 1343 (9th Cir.), *cert. denied*, 474 U.S. 1022, 106 S.Ct. 574, 88 L.Ed.2d 557 (1985) (limiting restitution to amounts alleged in indictment) and *United States v. Hawthorne*, 806 F.2d 493, 501 (3rd Cir. 1986) (restitution limited to losses attributable to offense of conviction). Congress must have been aware that such a limitation was placed on the FPA by some courts. Given the absence of any limiting language in the VWPA, it is reasonable to infer that Congress did not intend to limit victim compensation to the amount specified in the indictment. *Hill*, 798 F.2d at 405.[5]

Furthermore, it is clear from the legislative history of the VWPA that one of the principal purposes of the Act was to ensure that wrongdoers, to the degree possible, make their victims whole. *See* S.Rep. No. 532, 97th Cong.,

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[5] This Court has explicitly held that district courts have the authority "to order a defendant to pay restitution in an amount greater than the loss alleged in the indictment." *United States v. Kirkland*, 853 F.2d 1243, 1250 (5th Cir. 1988). *Kirkland* is not dispositive beyond its facts, however, because the restitutive amount was specifically addressed in the plea bargain to which the defendant agreed. This is distinguishable from Hughey's case, because Hughey's plea bargain was silent on the issue of restitution.

2nd Sess. 30, *reprinted in* 1982 U.S.Code Cong. & Admin. News 2515, 2536-37. That such was a principal purpose of the VWPA has been repeatedly recognized by numerous appellate courts. *See United States v. Duncan*, 870 F.2d 1532, 1535 (10th Cir. 1989); *Berrios*, 869 F.2d at 29-31; *United States v. Pomazi*, 851 F.2d 244, 248-49 (9th Cir. 1988); *Hill*, 798 F.2d at 405-407; *United States v. Anglian*, 784 F.2d 765, 767-68 (6th Cir.), *cert. denied*, 479 U.S. 841, 107 S.Ct. 148, 93 L.Ed.2d 89 (1986).

Given the compensatory objectives of the VWPA, it is difficult to justify limiting restitution to either the particular counts or amounts charged in the indictment. It is important to note that a prosecutor's decision regarding the number of counts with which to charge a defendant is discretionary. Factors may figure into that determination which have little or nothing in common with the congressional objective of compensating crime victims. The decision as to which counts should be the subject of prosecution may be based upon office policy, the strategic use of certain criminal transactions as evidence, or evidentiary considerations geared to securing convictions based on a "beyond a reasonable doubt" standard. Usually of less immediate concern is the victims' financial loss, which is judged by the less onerous "preponderance of the evidence" standard.

Finally, if restitution were limited to the count of conviction, given the high levels of plea bargaining within our criminal system, in the majority of cases a victim could not be made whole. Congress was not unaware of the pervasive phenomenon of plea bargaining when it passed the VWPA. It is not persuasive to attribute Congress with its stated intent of providing for the full

restitution of victims yet simultaneously shaping the statute so that it could be rendered substantially nugatory through plea bargaining. *See Berrios*, 869 F.2d at 30. We therefore find that both the statutory language and history affirm a trial court's power to assess restitution for losses caused by offenses not charged in the indictment.

C. *Case Authority*

Hughey's case presents a specific set of circumstances which are of first impression in this Circuit. It requires restitution under the VWPA for a loss greater than that attributable to the offense of conviction when: (1) the defendant was charged with multiple offenses, and the various counts are similar to each other; (2) the plea bargain was silent on the issue of restitution; (3) the defendant did not acknowledge the government's proposed restitutive figure as correct, but neither did he challenge the amount put forward; (4) each of the offenses which were not charged in the indictment but form the basis for the restitutive amount involved the same defendant the same victim, and the same type of crime; (5) none of the counts, however, alleged a conspiracy or scheme.

Case authority in other circuits supports the broader interpretation of the term "offense" in circumstances such as Hughey's. Both the Second and Tenth Circuits have held that restitution under the VWPA is not limited to the offense of conviction in cases in which the factual circumstances closely parallel Hughey's. *Berrios*, 869 F.2d 25 (2nd Cir. 1989); *United States v. Duncan*, 870 F.2d 1532 (10th Cir. 1989). *See also United States v. Spambanato*, 876

F.2d 5 (2nd Cir. 1989) (applying *Berrios* in parallel circumstances). In *Berrios* the defendant pleaded guilty to one count of mail theft and the other counts were dropped. The Second Circuit held beyond cavil that the district court had the authority to order Berrios to make restitution of the full amount of loss attributable to his related criminal course of conduct as long as he was forewarned such restitution might be ordered and he was given an opportunity to contest any allegations as to the amount of loss he was supposed to have caused. *Berrios*, 869 F.2d at 32.[6]

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[6] It might be argued that *Berrios* is distinguishable from the circumstances of Hughey's case because the *Berrios* Court found and relied in part on the fact that Berrios acknowledged guilt for the criminal acts of which he was not convicted. The Court made much of the fact that Berrios acknowledged responsibility for his victim's entire loss in order to receive a lenient sentence. *Berrios*, 869 F.2d at 32-33. While this is true, Berrios contended throughout the trial and appellate proceedings that although he had a "moral obligation" to repay the full amount, he did not concede liability for, nor agree to make restitution of, any amount higher than the sum charged in the information to which he pleaded guilty. *Id.* at 28.

The Second Circuit held that VWPA did not "limit the sentencing court's restitutionary [sic] authority to the amount specified in the charge on which the defendant is convicted where the victim of that offense also suffered other losses as a result of the defendant's related course of conduct." *Id.* at 32. The Court held that the amount of loss must "either be conceded by the defendant or be adjudicated by the court." *Id.* Thus even if the *Berrios* decision relied to some extent on Berrios' concessions, the rule as fashioned by the Court applies to cases such as Hughey's where the defendant is completely silent regarding the criminal acts alleged to have caused loss, and the court determines the amount of loss independently.

Similarly in *Duncan*, after an analysis of the language and purpose of the VWPA, the Court concluded:

> [T]he VWPA does not restrict a sentencing judge to considering only those acts for which conviction was had, or for which the defendant pleaded guilty. The judge ordering restitution under the VWPA is free to look beyond the indictment to other acts committed by the defendant that caused a loss to the victim. . . .
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> . . . .
>
> . . . the VWPA does not prohibit an award of restitution based upon criminal activity that does not encompass the elements of the crime for which the defendant pleaded guilty, if there is a sufficient connection between such crimes.
>
> We therefore hold that when there is evidence that the defendant committed other criminal acts that had a significant connection to the act for which conviction was had or for which a guilty plea was entered, a sentencing judge may order restitution for such losses resulting from such acts if the Government can prove both that the defendant caused such losses, and the amount of such losses, by a preponderance of the evidence.

Duncan, 870 F.2d at 1536-37.

Hughey argues that restitution for losses beyond those attributable to the offense of conviction may be ordered only if the offense of conviction involved either a conspiracy or a "scheme." In such circumstances, it is conceded that the non-convicting offenses may be considered part of or in furtherance of the offense of conviction. But, the rule the *Duncan* Court fashioned and then employed did not rely on the "scheme" rationale, although Duncan's offense of conviction was mail fraud,

which had been found to involve a "scheme." *See United States v. Angelica*, 859 F.2d 1390 (9th Cir. 1988); *United States v. Pomazi*, 851 F.2d 244, 249 (9th Cir. 1988). *Duncan* did refer to a "scheme" but only to establish that the forgery of check endorsements was closely enough related to the mail fraud conviction to allow broader restitution:

> Although the precise contours of the scope of "offense" under the VWPA must be determined under the facts of each case, *we interpret the VWPA to permit an order of restitution for losses incurred by the victim as a consequence of the defendant's criminal acts other than those for which a guilty plea was entered,* when there is a *significant connection* between those other criminal acts and the crime for which the guilty plea was entered.

Duncan, 870 F.2d at 1536 (emphasis added). As long as there is a *significant connection* between the crime of conviction and the other offense, there is no requirement that a conspiracy or scheme need be shown to justify restitution beyond the offense of conviction.

Two other cases, while not duplicating Hughey's factual situation, support the trial court's order of restitution: *Hill*, 798 F.2d 402 (10th Cir.1986); *Pomazi*, 851 F.2d 244. The *Hill* court held:

> [I]n determining the amount of loss to a victim for purposes of awarding restitution under VWPA, a district court *is not limited either by the amount specified in the indictment or the specific transactions alleged in the indictment*. . . .[A] district court may order a defendant to pay restitution to any victim for the amount of loss sustained "as a result of the offense," 18 U.S.C. § 3580(a), so long as this amount is supported by a preponderance of the evidence.

Hill, 798 F.2d at 406 (emphasis added). *Hill* is distinguishable from the case at hand because the defense attorney acknowledged the accuracy of the court's restitutive amount and there was no plea bargain. Nevertheless, the court laid down the same broad rule which we employ in this case.

In *Pomazi*, the Ninth Circuit ordered restitution to numerous victims of the defendant's mail fraud scheme, although, pursuant to a plea bargain, the defendant was convicted of only two counts of mail fraud involving one victim. Hughey argues that *Pomazi* employs the scheme rationale because it only addresses cases in which "the crime charged involves a scheme to defraud" in its final holding, and hence it is not directly on point. *Id.* at 250. The broad rule and the logic it employs, however, provide strong support for the decision of the district court in this case.

Hughey urges as countervailing authority three cases: *United States v. Durham*, 755 F.2d 511 (6th Cir. 1985); *United States v. Barnette*, 800 F.2d 1558 (11th Cir. 1986), *cert. denied*, 480 U.S. 935, 107 S.Ct. 1578, 94 L.Ed.2d 769 (1987); and *United States v. Mischler*, 787 F.2d 240 (7th Cir. 1986). In *Durham* the Sixth Circuit held restitution could only be ordered for the offense of conviction, a narrower reading of the term "offense" than the District Court employed in the case before us. The *Durham* court, however, also held the term "victim" was intended to be interpreted broadly. Hence, the Sixth Circuit found that "Congress intended a 'victim' to be a person who suffered injury as a result of the defendant's actions that surrounded the commission of the offense, regardless of whether the actions are elements of the offense charged."

Durham, 755 F.2d at 513. Durham pleaded guilty to bank robbery but challenged the court's authority to order restitution for arson which destroyed an automobile during the course of the robbery. Although Durham was not convicted of arson, because the arson was committed and the car destroyed during the course of his escape from the bank robbery, the insurer of the automobile was considered a victim of Durham's offense of conviction.

The Sixth Circuit employed similar logic in *United States v. Mounts*, 793 F.2d 125 (6th Cir.), *cert. denied*, 479 U.S. 1019, 107 S.Ct. 673, 93 L.Ed.2d 724 (1986). Mounts pleaded guilty to one count of illegally receiving explosives. He was ordered to make restitution for the damage to a company whose safe he attempted to blow up and whose automobile he destroyed in his attempt to escape. The district court awarded restitution based on the losses related to the business equipment and the stolen automobile. As the Tenth Circuit pointed out in *Duncan*,

> Although the Sixth Circuit purports to apply a restricted definition of "offense," [footnote omitted] we believe that the result in *Mounts* regarding restitution for damage to the stolen Corvette and for losses attributable to stolen business property is consistent with the definition of 'offense' applied in *Hill* and *Pomazi*. This result demonstrates that the VWPA does not prohibit an award of restitution based upon criminal activity that does not encompass the elements of the crime for which the defendant pleaded guilty, if there is a sufficient connection between such crimes.

Duncan, 870 F.2d at 1537. We agree with this interpretation of *Mounts* and *Durham*, believing (with the

Tenth Circuit) that *Mounts* and *Durham* support our interpretation of the VWPA because the narrow definition of "offense" was "effectively obliterated" by applying the broad definition of "victim." *Id.* at 1537 n. 2. To the extent that the narrow definition of "offense" might limit restitution under the VWPA, however, we decline to accept the reasoning of the Sixth Circuit.

Hughey's Eleventh Circuit case, *Barnette*, states that the amount of restitution under the VWPA and FPA "may not exceed the actual losses flowing from the offense for which the defendant has been convicted." *Barnette*, 800 F.2d at 1571-72. The *Barnetie* Court, however, applied its holding to both the FPA and the VWPA in its two paragraph consideration of the issue, and did not cite any VWPA case as authority. It did not address the VWPA provisions separately. Given the differences between the two acts, we find *Barnette* not clearly in point.

Finally, the Seventh Circuit case cited, *Mischler*, 787 F.2d 240, is not applicable to the facts of our case. The trial court was held to have abused its discretion in ordering broad scale restitution for all counts of the indictment. The Mischlers, unlike Hughey, challenged the factual accuracy of the restitutive amount assessed, but were not given an opportunity to elaborate the basis for their challenge. The district judge was also found not to have relied on accurate information in determining the restitution. No such inaccuracy of calculation has been shown or alleged by Hughey.

A stronger case for Hughey's position from the Seventh Circuit is *United States v. Paul*, 783 F.2d 84 (7th Cir. 1986). Paul pleaded guilty to embezzlement and was

ordered to make restitution of a greater amount than she had admitted to having embezzled. She failed to object to the computation of the amount of restitution at the time of sentencing (unlike the Mischlers). *Paul* held, however, that when imposing restitution greater than that charged in the relevant count, the defendant must obtain the proceeds "as part of an ongoing scheme to defraud which extends over time, and . . . the amount of damages to the victim [must be] established with specificity and [be] admitted to by the defendant in the indictment, the plea agreement and presentence proceedings." *Paul*, 783 F.2d at 88. This rule was first enunciated in *United States v. Davies*, 683 F.2d 1052, 1054 (7th Cir. 1982). The *Paul* Court explicitly concluded that:

> [T]he government's interest in leaving the precise amount of restitution undetermined until the sentencing stage is very slight. . . .[T]he interests of due process and fairness to the defendant require that the government satisfy the *Davies* test at the plea bargaining stage before an amount of restitution greater than that charged can be ordered.

Paul, 783 F.2d at 89. To the extent that the *Davies* test, as employed in *Paul*, would prevent a district court from ordering restitution under the VWPA greater than that charged in the indictme , we find it would cripple proper application of the WPA.

We conclude that the VWPA permits a court to require restitution beyond that amount involved in the offense of conviction when there is a significant connection between the crime of conviction and similar actions justifying restitution. This is the law also of the Second, Ninth, and Tenth Circuits as seen in *Berrios*, *Pomazi* and

Duncan, respectively. We do not need in the case before us further to define at this time what constitutes a "significant connection" between the offenses of indictment or conviction and those additional acts for which restitution was ordered. In this case, the nexus is strong. Here the restitution order involved the same defendant, the same victim, and multiple identical criminal offenses.

II. Standard of Proof and Sentencing Procedure

Hughey argues that imposition of restitution pursuant to the VWPA imposes "criminal responsibility" for the offenses which form the basis of the restitutive order. Hence, he maintains that the preponderance of the evidence standard is inapplicable and that he must be found guilty of these offenses under the criminal standard of "beyond a reasonable doubt."

This argument is made without citation to any authority and misconstrues the purpose of the VWPA. The purpose of the Act is restitutive, and restitution is assessed as part of sentencing. It is not a finding of "criminal responsibility." The VWPA clearly provides for a preponderance of the evidence standard of proof. 18 U.S.C. § 3580(d).[7]

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[7] 18 U.S.C. § 3580(d) (1982) provides:

> Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the

(Continued on following page)

Hughey's standard of proof argument, however, does raise the issue of what procedural safeguards are required before restitution can be imposed for offenses which are not the basis of a conviction. Under the VWPA a court may order restitution to any victim, § 3579, based on information gathered and furnished by the probation service, § 3580. Pursuant to Rule 32 of Fed.R.Crim.P., the presentence report furnished by the probation service must contain information about the financial harm or loss suffered by any victim. That report must be timely disclosed to the defendant who may challenge any factual inaccuracy it contains. *United States v. Patterson*, 837 F.2d 182, 183 (5th Cir. 1988). In addition, the defendant must be forewarned that restitution may be ordered in an amount higher than the crime of conviction, and he must be given an opportunity to contest any allegation as to the amount of loss he has supposed to have caused. *United States v. Corn*, 836 F.2d 889, 893-94 (5th Cir. 1988); *Berrios*, 869 F.2d at 32; *Mischler*, 787 F.2d at 246-47. *See also* Fed.R.Crim.P. 11(c)(1). However, "nothing in the text or legislative history of the VWPA [indicates] that Congress intended the sentencing hearing to be transformed into a second trial on the issue of restitution." *United States v. Cloud*, 872 F.2d 846 (9th Cir. 1988).

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attorney for the Government. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant and such defendant's dependents shall be on the defendant. The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires.

Hughey was notified ahead of time that the broader restitution would be sought. His attorney briefed these issues well in presentence hearings. Hughey was not the victim of any unfair surprise. The government bears the burden of proving the amount of loss sustained by the victim, but the burden of demonstrating the defendant's lack of financial resources is upon him. § 3580(d). The government in this case came forward with proffered testimony for the purpose of proving the amount of financial loss for which Hughey was responsible. Hughey stipulated that this testimony was admissible, and while he did not admit that any of it was true, neither did he dispute the accuracy of the calculation of the amounts proposed. Given the testimony, the government clearly met its burden of proving the losses by the preponderance of the evidence. The burden then shifted to the defendant to challenge that estimate of loss. He did not do so. It is unacceptable for a defendant to be able to agree to a plea bargain and then by maintaining his silence, thwart the VWPA's restitutive purpose in the face of persuasive evidence of losses he has caused.

In the absence of any challenge to the accuracy of the district court's assessment, we need not further explore any constitutional claim on this ground. *Durham*, 755 F.2d at 514.

III. Defendant's Financial Resources

Finally, Hughey argues that the court did not properly assess his indigency, and that it did not give adequate consideration to a "compromise" figure which he proposed for restitution. In failing to do so, he urges, the

court did not build an adequate record for consideration upon appeal. These claims can be refuted with brevity.

First, the Act states that the sentencing court shall consider the amount of loss sustained by any victim, the financial resources of the defendant, his financial needs and earning ability, the needs of his dependents, "and such other factors as the court deems appropriate." 18 U.S.C. § 3580(a). The defendant's financial resources are only one factor to be considered in a nonexhaustive list provided by the statute.[8] Another factor which may be considered is the culpability of the defendant. *United States v. Anglian*, 784 F.2d 765, 768 (6th Cir.), *cert. denied*, 479 U.S. 841, 107 S.Ct. 148, 93 L.Ed.2d 89 (1986). We have recently held that indigency does not bar a restitutive award under the VWPA. *United States v. Ryan*, 874 F.2d 1052, 1054-55 (5th Cir. 1989). *See also Mounts*, 793 F.2d at 128. Furthermore, the trial judge had Hughey's financial information at his disposal, and stated that he had examined it. This demonstrates sufficient consideration of the statutory factor. *United States v. Atkinson*, 788 F.2d 900, 902 (2nd Cir. 1986).

Hughey offered to pay for all losses attributable to the Godfrey credit card, the credit card used in the

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[8] 18 U.S.C. § 3580(a) (1982) provides:

> The court, in determining whether to order restitution under section 3579 of this title and the amount of such restitution, shall consider the amount of the loss sustained by any victim as a result of the offense, the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate.

offense to which he pleaded guilty. The district court, however, required him to make restitution in full for all offenses for which the government offered proof as against the same victim, the bank. The VWPA provides that "[i]f the court does not order restitution, or orders only partial restitution under this section, the court shall state on the record the reasons therefore." 18 U.S.C. § 3579(a)(2). There is no mention in the statute of any requirement that a court must also state on the record reasons for ordering full restitution. It is apparent from the statute that restitution in full is to be considered the norm. Restitution in part is a deviation from that norm and requires an explanation in the record. Nevertheless, *Hughey* argues that explicit factual findings should have been made by the district court in reference to his compromise offer.

We have recently held that:

> The decision to assign reasons is committed to the sound discretion of the district court, guided by this singular inquiry – absent an assignment of its reasons, does the record contain sufficient data for the appellate court to perform its mandated review? If the record provides an adequate basis for that review, the court need not assign specific reasons for its decision to order full restitution. If the record is insufficient, reasons must be assigned.

Patterson, 837 F.2d at 183-84. The record in this case contains a presentence investigation report by the United States Probation Office, which detailed the defendant's financial resources. Coupled with the district court's detailed order (which denied the defendant's Rule 35 motion) and the government's offer of proof, an adequate

record on which to review this case was provided. *See Ryan*, at 1054. Given the record in this case, there was no need for an explicit finding by the district court regarding the compromise offer. *Patterson*, 837 F.2d at 184. *See also United States v. Cannizzarro*, 871 F.2d 809, 810-11 (9th Cir. 1989). The defendant's assertion that there is not an adequate record for this Court to perform its appellate review is without merit.

Conclusion

Hughey's guilty plea to the one offense of misuse of a credit card, in conjunction with the government's offer of proof, formed a sufficient basis for the district court to order restitution. The restitution order properly exceeded the amount involved in the offense for which conviction was obtained since the restitution ordered had a "significant connection" with the conviction offense. The proper standard of proof was employed by the district court, and there was a sufficient record upon which to base the order of restitution. The district court's denial of Hughey's rule 35 motion must be affirmed.

AFFIRMED.

SUPREME COURT OF THE UNITED STATES

No. 89-5691

Frasiel L. Hughey,

Petitioner

v.

United States

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

On Consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

The parties are directed to adhere to the following briefing schedule. The brief of the petitioner must be received by the Clerk on or before February 9, 1990. The brief of the respondent must be received by the Clerk on or before March 6, 1990, and a reply brief, if any, must be received by the Clerk on or before March 16, 1990.

January 8, 1990